

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. JR1658/01

In the matter between:

STEVEN RAYMOND VAN WYK

Applicant

and

ALBANY BAKERIES LIMITED

First

Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second

Respondent

TSHEPO MASHIGO N.O.

Third

Respondent

JUDGMENT

NDLOVU AJ

[1] The Applicant, a former employee of the First Respondent (the Employer) launched this review application in terms of section 145 of the Labour Relations Act 66 of 1995 (“the Act”), whereby he sought

to have the arbitration award issued by the Third Respondent (the Commissioner) on 4 September 2001 under case number GA31-01 reviewed and set aside. (The notice of motion erroneously reflected the case number as GA29285). He further sought that the

2

Court determines the matter in terms of section 145(4) of the Act, or alternatively, remit it for a rehearing by a different commissioner.

[2] The evidence before the Commissioner revealed that the employment of the Applicant with the Employer commenced on 13 July 1999. The Employer operated the business of a bakery from a number of branches (bakeries) in certain parts of the country. The branches were grouped and demarcated into regions. The Applicant was appointed as the regional manager for the Gauteng region, which consisted, among others, Menlyn, Pretoria and West Rand branches.

[3] In or about September 1990 the Applicant was transferred to the Pretoria Branch which, according to the Applicant, it had been agreed between him and the management that it was only a temporary transfer. He submitted that whilst in Pretoria acting as branch manager, he still retained his position as, and performed the functions of, the Gauteng regional manager. He stated that a certain Mr Colin McCabe had been interviewed for the Pretoria branch manager's position and indeed started work there in December 2000.

[4] On 6 February 2001 the Applicant was informed by Mr Noel Doyle, described as the Employer's Category Director (Managing) that there was a restructuring process of the Employer's business which was

underway, and that the position of regional manager would be disbanded. Doyle further told the Applicant that, as a result, the Employer had decided to appoint the Applicant as manager of

3

the Pretoria branch, but without change in his salary. This, the Applicant found unacceptable as he regarded the change in his position or rank as a demotion. Hence, on 19 February 2001 the Applicant tendered his resignation, which was to take effect on 31 March 2001.

[5] The Applicant contended that his resignation was occasioned by the Employer which had made his continued employment intolerable, thus rendering his resignation a constructive dismissal. Consequently, he referred the dispute to the Second Respondent (“the CCMA”) for conciliation. However, the conciliation process failed to resolve the dispute and a certificate to that effect was issued on 4 May 2001 in terms of section 135(5)(a) of the Act. The employer refuted the allegation that it made the Applicant’s continued employment intolerable.

[6] The dispute was then referred to arbitration. The arbitration hearing was subsequently conducted by the Commissioner who, in his award concluded as follows:

“I therefore conclude on evidence before me that the Applicant has failed to make a case of constructive dismissal”.

It is this award which the Applicant now seeks to be reviewed and set aside.

[7] The Applicant submitted in his founding affidavit that the Employer had repudiated the employment contract between the parties, which repudiation the

4

Applicant had accepted. He submitted that under such circumstances he had a choice of either demanding specific performance from the Employer or cancelling the contract and claim compensation. He had opted for the latter.

[8] It was argued by Mr Snyman (for the Applicant) that the lowering of the Applicant's position from regional manager to branch manager was a material breach of the Applicant's employment contract with the Employer, irrespective of whether or not the salary was reduced. Therefore, Mr Snyman submitted, the fact that the Applicant had then requested to be offered a retrenchment package had to be understood in that context. He contended that the finding that there had been no demotion was a misdirection on the Commissioner's part.

[9] Mr Wesley (for the Employer) submitted that the Applicant had no grounds for review. He argued that the Applicant was not dismissed by the Employer, constructively or otherwise. The Applicant's redeployment was no demotion. However, even if the Court found that the Applicant was demoted he should not have resigned. In other words, a finding that there was indeed a demotion, would not be

sufficient. He further argued that not every repudiation of an employment contract would amount to intolerability, which was a prerequisite of constructive dismissal. He submitted that if the Court found that indeed not every cancellation of an employment contract (based on repudiation) amounted to constructive dismissal, then this review should fail. He further pointed out that the issue of intolerability was not pleaded in the Applicant's founding affidavit.

5

[10] A *constructive dismissal* occurs when -

“an employee terminates a contract of employment with or without notice because the employer made continued employment intolerable for the employee”.
(*Section 186(1)(e) of the Act*).

[11] Like in every contractual relationship it is implied in an employment contract that neither the employer nor the employee would do, or omit to do, anything that would cause either of them to find it impossible or difficult to continue as a party in the employment relationship. Such conduct would amount to repudiation of the contract. Therefore, by making the employee's continued employment intolerable, the employer thereby repudiates the employment contract.

[12] In *Pretoria Society for the Care of the Retarded v Loots* [1997] 18 ILJ 981 (LAC) at 983J-984A, the Labour Appeal Court cited with approval from the decision in *Woods v W M Car Services (Peterborough)* (1981) IRLR 347 at 350, where the Employment

Appeal Tribunal stated as follows:

“It is clearly established that there is implied in a contract of employment a term that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee:

Courtaulds Northern Textiles Ltd v Andrew [1979]

IRLR 84. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract: the Tribunal’s function is to look at the employer’s conduct as a whole and determine

6

whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it

the conduct of the parties has to be looked at as a whole and its cumulative impact assessed”.

(See also: Jooste v Transnet Ltd t/a S A Airways [1995] 16 ILJ 629 (LAC) at 638 H-J.

[13] Again, as in every contractual relationship, where the employer repudiates the contract, the employee (being the innocent party) has the right either to reject the repudiation and demand specific performance in terms of the contract from the Employer (being the guilty party) or to accept the repudiation and cancel the contract, in which latter event the employee would be entitled to claim damages or compensation, as the case may be, from the employer.

[14] In ***Monyela & Others v Bruce Jacobs t/a L V Construction [1998] 19 ILJ 75 (LC) at 82 E-G*** (per Zondo J - as he then was) the Court stated as follows:

“If the employer changes the terms and conditions of employment of the workers without their consent, its conduct may constitute a repudiation of the workers’ contracts of employment. In that event the workers will have an election whether to accept the repudiation and claim whatever damages they may suffer as a result of such repudiation or they may reject the repudiation and hold their employer to their contracts of employment”.

- [15] It was argued, on behalf of the Employer, that the Applicant’s redeployment to the branch manager’s position did not amount to a demotion because, among others, his salary was not reduced. The Commissioner agreed with the Employer. He made himself clear: *“Of significance is that the Applicant’s*

7

salary was never tampered with, it remained the same. I do not agree with the Applicant when he says that he viewed this action (the redeployment) as a demotion” (at page 27 of the Bundle).

- [16] The dictionary meaning of the word “demote” is: *“Reduce to a lower rank or class”*. (*The New Shorter Oxford English Dictionary, 1993 edition, at page 631*).

- [17] A demotion has therefore less to do with the demoted employee’s salary. It would seem the reduction of salary is only a secondary factor, the primary and decisive factor being the reduction in rank, position or status of the employee concerned. However, it further appears to me, the reduction of salary but without change in the name of rank or position has the effect of

reducing the employee's status in the workplace, if it is done without his/her consent.

Therefore, such an instance could still in my view, constitute a demotion.

In any event, that scenario is not part of the enquiry before the Court.

[18] In *Taylor v Edgars Retail Trading [1992] 13 ILJ 1239 (IC) at 1242J-1243A* the Industrial Court referred to the concept of demotion, as formulated by Scoble in *The Law of Master and Servant* at page 176, as follows:

“Where a servant is employed to perform a particular class of work and contracts to perform work of a particular character, is thereafter instructed to perform work of a more menial nature, he may be said to have been degraded in his status, and such act by his employer may in certain circumstances be regarded as tantamount to a dismissal”.

(Cited with approval in *Matheyse v Acting Provincial Commissioner,*

Correctional Services & Others [2001] 22 ILJ 1653 (LC) at 1658J-1659A).

[19] In *Matheyse's* supra the Court further elaborated on the issue of demotion and stated:

“In a series of decisions (which predated the LRA) the civil courts have gone further and applied a wider definition to the concept of demotion in the labour relations context,

holding that it applies even where employees retain their salaries, attendant benefits, and rank, but have suffered a reduction or demotion in their ‘dignity’, ‘importance’ and ‘responsibility’ or in their ‘power’ or ‘status’”.

[20] It is common cause that on 6 February 2001 Noel Doyle, the Employer's Category Director (Managing) informed the Applicant that he (the Applicant) would be redeployed to the position of Pretoria branch manager as a result of the restructuring of the Employer's business. I agree with Mr. Snyman that this decision to redeploy the Applicant in the manner aforesaid amounted to a unilateral alteration of the Applicant's working conditions in terms of his employment contract with the Employer. It was unilateral in that the Applicant had not been consulted about it at all. It was merely presented to him as a *fait accompli*. The decision was officially implemented through the Employer's document headed "Announcement", which was issued and circulated by the Employer within the workplace on 12 February 2001.

[21] The Announcement aforesaid read, among others, as follows:

"In order to meet the challenges facing the business, the following changes have been implemented with immediate effect. A revised organogram is attached.

9

12
3 Steven van Wyk takes up a position as Bakery Manager
Pretoria.
4
5
6 All Bakery Managers will report directly to myself.

I am sure you will join me in wishing all of the best to the above gentlemen in their roles.

(Signed) Noel Doyle
CATEGORY DIRECTOR (MANAGING)”

[22] Evidently, the document does not attempt to reflect any bilateral co-operation between the Employer’s management and the affected employees.

[23] The labour force is an integral part of the industrial dynamics and development in every country and, therefore, essentially one of the major attributes to the creation and maintenance of the sound economic growth in the country. It is accordingly not unreasonable to expect of an employer that whenever a management decision is contemplated which would impact adversely on the working conditions of a particular employee or group of employees, a sincere and meaningful discussion on the issue be conducted with the affected employees. Indeed his position is consistent with the consultation process envisaged in section 189, which is supposed to precede any retrenchment exercise by an employer. The Labour Appeal Court in *Van der Riet v Leisuren et t/a Health and Racquet Club [1998] 5 BLLR 471 (LAC)* (*per*

10

Kroon JA) stated: “Despite the existence of a commercial rationale of the introduction of the new structure, including the demotion of the Appellant, the important fact is that it was effected without any consultation with the Appellant. That conduct on the part of the Respondent was unfair **vis-a-vis** the Appellant” (at

paragraph 39)”.

- [24] The position of regional manager involved being in charge of all branches (and their managers) which fell within a particular region. All such branch managers reported to the regional manager. The position of branch manager was therefore inferior to that of regional manager. It followed, accordingly, that the redeployment of the Applicant, without his consent, from the position of regional manager to that of branch manager (with or without change in his salary structure) constituted a demotion.
- [25] A demotion is characterised as an unfair labour practice in terms of section 186(2)(a) of the Act. A remedy available to an employee who has been unfairly demoted is, in terms of the Act, to refer the dispute to the CCMA or the relevant accredited council, as the case may be, and allow the dispute resolution mechanism to take its course, in terms of sections 135 and 191(5)(a)(iv) of the Act, being the conciliation and the arbitration processes, respectively. However, this route is only but one option available to the demoted employee. The demotion as such is a repudiation by the employer of the employment contract with the demoted employee. As alluded to earlier, where an employer has repudiated the employment contract in this way, the employee has two options, namely, either to reject the repudiation and demand specific performance by the employer. That is, the removal by the employer of the act or omission on the

employer's part which constituted the repudiation. The other option is for the employee to accept the repudiation, thereby cancelling the employment contract and then claim compensation from the employer. Such compensation is equivalent to damages for breach of contract.

[26] Therefore, in my view, the referral of a demotion complaint to the dispute resolution mechanism provided for in the Act, as alluded to above, is only the instance where a demoted employee exercises the right to reject the employer's repudiation and demand specific performance, in the form of reversal of the employer's conduct complained of. This position, however, does not detract from the employee's right to prefer the other option, namely, to accept the repudiation and cancel the contract, whereafter claim compensation from the employer. In practical terms the latter option would, almost invariably, involve the employee concerned resigning from employment and claiming compensation from the employer. The resignation could, in such circumstances constitute constructive dismissal, which is *ipso facto* unfair. This is what happened with the Applicant in the present instance. In **W L Ochse Webb & Pretorius (Pty) Ltd v Vermeulen [1997] 18 ILJ 361 (LAC) at 367B-D (per Froneman J)** the Court stated:

"If one deals with the case in the more conventional manner outlined in the ***Transnet*** case, the following would result: The Respondent's resignation was, in common-law contractual terms, an acceptance of the Appellant's repudiation of a material term of the common-law

contract of employment. The resignation itself was consistent with an intention on the part of the Respondent to

12

pursue his remedy, as he saw it, of compensation due to him as an employee in terms of the Act (*see National Automobile & Allied Workers Union (now known as National Union of Metalworkers of SA v Borg-Warner SA (Pty) Ltd [1994] 15 ILJ 509 (A) (at 518)*). The matter was thus justifiable under the Act. The Appellant's repudiation caused the respondent's dismissal. His dismissal was therefore, in a practical sense, at the behest of his employer. It thus qualifies as a "constructive dismissal...."

[27] The fact that the Applicant asked for a retrenchment package on 6 February 2001 did not, in my view, render his resignation a voluntary one, in the true sense of the word. He asked for the retrenchment package only after he was told about his permanent redeployment (which was, his demotion) and not before. Indeed, he seemed to consider a retrenchment package a better option than the demotion. I cannot say he was wrong in this assessment, in the light of the circumstances he found himself in. Of course, it would also probably have depended on what retrenchment package was put on the table as an offer to him.

[28] The language used in his letter of resignation dated 19 February 2001 manifested no voluntariness to resign on the part of the Applicant, but

rather only a deep frustration. The letter read thus:

“Noel Doyle,
“Category Director, (Managing), Baking

**SUBJECT: RESIGNATION - S R VAN WYK
AS AT 28th FEBRUARY 2001**

13

Sir,

It is with regret that I wish to advise you of my resignation.

* This is due to the fact that I believe you have been **procedurally unfair** in offering me the position of Bakery Manager at Pretoria Bakery whilst it is a known fact that you have offered this position to Colin McCabe, who has already relocated his family to Pretoria.

* You furthermore **failed to consult with me before changing my conditions of service** and refused to offer me a retrenchment package after demoting me from Regional Manager to Bakery Manager without any consultation. By your own admission, this was neither a performance nor a capability issue.

* Furthermore you requested me not to go to a Labour Lawyer for advice.

* You informed me that Colin McCabe was coming to Pretoria Bakery as my assistant, yet after you met with me on Tuesday 6th February, 2001, you met with Colin McCabe on Saturday, 10th February, 2001 and confirmed his transfer to Pretoria as the Bakery Manager. This makes the working relationship with Albany Bakery unbearable.

* You were also **substantively unfair** in giving George Slabbert the option of a demotion from a Bakery Manager to an Assistant Manager and then

you offered him a 4 month retrenchment package -
yet you refused to offer me the same.

My last working day will be 31 March 2001.

Yours sincerely

Mr S R van Wyk”

[29] In *Pretoria Society for the Care of the Retarded*, *supra*, the Court noted:

“Perhaps the best example of a constructive dismissal is the repudiation of the contract of employment by the employer who compels the employee to resign”. (at 984A).

[30] The evidence and the material presented before the Commissioner was, in my opinion, overwhelming that the Applicant resigned as a result only of the Employer having demoted him. In this way, the Employer repudiated

the employment contract between the parties.

[31] Mr Wesley's submission that the Applicant did not, in the founding affidavit, plead intolerability, does not, with respect, hold any substance. The context from the entire reading of the founding affidavit reflects that intolerability was indeed part of the Applicant's pleadings. For example, he alleged, among others, as follows:-

“21. On 12 February 2001, a new company structure was announced, reflecting inter alia the change in my position i.e that of branch manager instead of regional manager.

22. On 13 February 2001 I contacted Doyle and informed him that I would not accept the demotion.

23. On 18 February 2001 I settled an email to the First Respondent (dated for the following day), stipulating that that (*sic*) I was demoted without consultation and that I was in lieu (*sic*) therefore not in a position to work for the First Respondent any longer”.

(paragraphs 21 - 23 of the Applicant's founding affidavit).

[32] The demotion of the Applicant aforesaid was, I venture to imagine, both a frustrating and humiliating experience. It was objectively both intolerable and unbearable. His choice to resign was, in my view, a reasonable and justifiable response to the Employer's apparently arrogant and wrongful repudiation of the parties' employment contract. The Applicant is therefore entitled to compensation in terms of section 194 of the Act. I consider, in the circumstances of this case, that compensation in the amount equivalent to the Applicant's six months salary, calculated at the rate of his salary on the date of dismissal, would be just and equitable. It was not disputed that at the time of his constructive dismissal aforesaid his salary was R36 236,99 per month. The Court determines, in terms of section 145(4), that an order giving effect thereto would be appropriate.

[33] The Court accordingly makes the following order:

- (1) The arbitration award issued by Commissioner Tshepo Mashigo (Third Respondent) on 4 September 2001 under Case No. GA31-01 is hereby reviewed and set aside, and substituted therefore with the following order:

“1 The Applicant's resignation from the Respondent's employ on 31 March 2001 constituted a constructive dismissal, which was an unfair dismissal.

“2 The Respondent is to pay compensation to the Applicant in the amount equivalent to the Applicant's 6 months' salary, calculated at the rate of the Applicant's rate of remuneration on the date of his dismissal, namely (R36 236,99 x 6) =

R217 421,94"

(2) The compensation aforesaid is payable within 30 (thirty) days of the date this Order.

(3) There is no order as to costs.

NDLOVU AJ

Appearances:

For the Applicant : Mr S Snyman

c/o

Snyman van der Heever Heyns

For the Respondent : Adv M Wesley

Instructed by : Brink Cohen LeRoux & Roodt Inc

Date of Judgment : 26 September 2003