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REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No 41/96

In the matter between

UNILONG FREIGHT DISTRIBUTORS (PTY) LTD APPELLANT

and

C MULLER RESPONDENT

CORAM: Vivier, Eksteen, F H Grosskopf, Nienaber JJA et Van Coller AJA.

HEARD: 22 September 1997

DELIVERED: 29 September 1997

J U D G M E N T

VIVIER JA:

The appellant ("the company") carries on a road transportation business, distributing goods throughout South Africa. Its head office is in Roodepoort and it has four branch offices in various parts of the country, the largest of which is in Wadeville, near Germiston, where the respondent was employed as branch manager from 1 October 1993 until 30 November 1993 when his employment terminated. The respondent thereafter contended that he had been constructively dismissed and that such dismissal constituted an unfair labour practice. This was disputed by the company which maintained that the respondent had accepted voluntary retrenchment. After an Industrial Council had been unable to settle the dispute the matter was referred to the Industrial Court for a determination in terms of sec 46 (9) of the Labour Relations Act 28 of 1956 ("the Act"). The Industrial Court found

that the respondent had failed to show that he had been constructively dismissed, consequently that the Court had no jurisdiction to entertain the application. It further held that even if he had been so dismissed such dismissal did not amount to an unfair labour practice. In this regard the Industrial Court held that respondent had failed in his work and that the company had every reason to be dissatisfied with his performance. It also held that the respondent had been given an opportunity to state his case.

The respondent's application was accordingly refused. No order was made as to costs. In terms of sec 17 (21A) (a) of the Act the respondent appealed to the Labour Appeal Court ("the LAC"). The appeal succeeded with costs. The LAC accepted the Industrial Court's finding that the company had sufficient reason to be dissatisfied with the respondent's work performance. But it held that the respondent had been constructively dismissed and that such

dismissal was procedurally unfair. The Industrial Court's order was set aside and a determination substituted therefor that the company had committed an unfair labour practice by terminating the respondent's employment on 30 November 1993. The company was ordered to pay the respondent an amount of R160 000-00 as compensation. In terms of sec 17C (1) (a) of the Act the company now appeals to this Court, the requisite leave having been granted by the LAC.

The LAC's finding that the respondent had been constructively dismissed was not challenged in this Court. The central issue before us was the correctness of the LAC's finding that the dismissal was procedurally unfair and so constituted an unfair labour practice. In finding an unfair labour practice the tribunal concerned is expressing a moral or value judgment as to what is fair in all the circumstances (*National Union of Metalworkers of SA v*

Vetsak Co-operative Ltd and Others 1996 (4) SA 577 (A) at 592 B-H). It is accordingly necessary to set out briefly the relevant background facts and events which led to the dismissal. (As to the classes of facts to which this Court may have regard, see those enumerated by **Smalberger JA** in the *Vetsak* case at 583 J-584 C and confirmed by the majority at 593 H-I.)

During July 1993 the company instructed a firm of management consultants, Dr J A Malan and Associates, to find a manager for its Wadeville branch. The instructions to this firm were to look for candidates not specifically in the transport industry but also to consider candidates from outside the industry. The respondent had no experience in the transport industry but had managerial experience and skills and was academically well qualified for the position. He was highly recommended by the said firm and after a successful interview with company officials he

was appointed as branch manager at Wadeville as from 1 October 1993. In terms of the contract of employment each party had the right to terminate the contract by giving one month's written notice to the other party.

The respondent duly commenced his duties on 1 October 1993. His first week was spent mainly with the company's general manager, Mr Barry van Staden, being given training, orientation and a general idea of what the company's business was all about. During his second week he also spent some time with the members of a firm of professional management consultants who were doing an efficiency, restructuring and staff training study for the company at the Wadeville branch. The respondent also had discussions with the company's managing director, Mr Wynand Burger, on his regular visits to the Wadeville branch. It was only from the third week that the respondent really got to grips with his duties as

branch manager.

During the next six weeks certain incidents occurred which convinced senior management that the respondent was incapable of performing the work he was employed to do. It was this conviction which led to his constructive dismissal on 30 November 1993. The first incident was during the monthly two-day management meeting which was attended by all branch managers and heads of departments and which was held during the last week of October 1993. Van Staden testified before the Industrial Court that he deliberately arranged for the respondent to be called upon to report and answer questions at the meeting only after he had had an opportunity to observe how the more senior managers handled their reports. When the respondent's turn came, and he was questioned about items of over-expenditure on the budget his standard response was that the budget was incorrect, instead of undertaking to

investigate the cause of the overspending. Van Staden said that his impression was that the respondent had either not taken notice of the way the other managers had responded to similar problems or that he had not prepared himself sufficiently.

A few days after the October 1993 meeting Van Staden received a complaint from a sales representative, Priscilla Brodie, who worked directly under the respondent, concerning a visit to a customer in Standerton, Wool and Textiles. Her complaint was that she had been sent to Wool and Textiles to negotiate the annual rate increase and that the respondent had accompanied her merely to meet the client and to learn how such negotiations were conducted. The respondent upset her negotiations by informing the client that the company's trucks were running empty to Durban and that it could pick up freight from Wool and Textiles at a lower tariff. The undisputed evidence was that this was a totally

impractical suggestion which embarrassed the company as its trucks travelled in the middle of the night when there was no labour available to load the trucks. They also did not use the Standerton route and in view of high-jackings which had occurred in the area it was considered dangerous to leave the main route in order to go to Standerton in the middle of the night. Brodie told Van Staden that as a result of the incident she was no longer prepared to work under the respondent.

At the time Van Staden was trying to placate Brodie he received a complaint from another employee, one Chantelle, who was the senior operations clerk in the Wadeville branch. She complained that the respondent had come into the office where she worked, that he had looked at her pay slip which was lying on her desk and that he had started discussing with her the size of her salary and the details of a personal loan which was being deducted

from her salary. This took place in the hearing of the other employees present which embarrassed her. On about 15 November 1993 Van Staden spoke to the respondent about the incident and told him that his conduct was unbecoming that of a manager. The respondent subsequently spoke to Chantelle and apologised to her.

Then there was the matter of the respondent exceeding his authority during negotiations with the trade union on the restruct= uring of work shifts. Following upon recommendations made by the team of management consultants the company had prior to the respondent's appointment decided to restructure the work shifts of its labour force in order to ensure that enough workers would be on duty during peak hours and to eliminate overtime. Restructured work shifts which had been prepared by Van Staden and other senior employees during September 1993 provided for the entire work force to work on Mondays, Tuesdays and Saturdays, which

were the busiest days, with one third of the labourers being given a day off on each of the remaining working days of the week. Mr Henry Bosch, the company's chief negotiator on labour relations, had been given the task of negotiating the new shifts with the shop stewards of the union. During October 1993 the respondent was told to attend the negotiations in order to familiarise himself with the negotiating process. He had no authority, however, to put any other proposals to the union than the one which Van Staden had worked out. At a meeting with shop stewards held on 11 November 1993 the respondent nevertheless put forward his own proposal which required all the workers to work a daily shift from Mondays to Fridays, a first group working from 7h00 to 17h00 and a second group working from 9h00 to 19h00. He had not discussed this proposal with anyone else involved in the negotiations or with senior management and it was totally

unacceptable to Van Staden. It meant that peak hours were not catered for, that there was no tapering off of the work force on the last three days of the week and that no provision was made for working on Saturdays. The union accepted the respondent's proposal and after implementing it for a month the company managed to have it changed as it did not work and caused many problems.

The respondent also acted without authority in the Silk and Textiles incident. Van Staden testified that because of the complex nature of the factors involved in quoting rates to customers the company's firm policy is to control rates centrally. All rate schedules and quotes are first checked by him personally and any proposed changes are first discussed with senior management before submitting these to customers. Van Staden said that he made this clear to the respondent during his first week in office. Nonetheless

the respondent during November 1993 and without any authority agreed new rates with Silk and Textiles which Van Staden calculated had since cost the company R3 500 per month in lost revenue. The respondent admitted in his evidence that he had no authority to negotiate new rates with customers.

The last weekend of November 1993 commencing on Friday 26 November was to be the respondent's duty weekend which meant that he was responsible for the operation of the branch that weekend. The new work shifts meant that labour would not automatically be available on the Saturday. Shortly before the operations staff went home at three o'clock that Friday afternoon Van Staden learnt that the respondent had not made any arrangements for overtime workers over the weekend. Van Staden then spoke to Mr Nigel Hamilton, a senior company official, and asked him to remind the respondent to make arrangements for

overtime workers, which Hamilton did. Van Staden said that what perturbed him about the incident was that none of the respondent's staff had been prepared to warn him that without overtime labourers he could expect problems. It was as if they were sitting back and deliberately letting him make his own mistakes. Van Staden said that the nature of the company's operations was such that it was not possible for the respondent to succeed without the support of his subordinates, and that it became clear to him towards the end of November 1993 that the respondent no longer had such support.

Van Staden and the respondent met on Monday 29 November and again on Tuesday 30 November 1993. The LAC found that the versions of the respondent and Van Staden differed as to what was said between them on those occasions but that it was not necessary to decide which of the two versions to accept as on either version the respondent was constructively dismissed on 30

November 1993. What transpired between the respondent and Van Staden is, however, of importance in deciding the issue of whether the dismissal was fair or not.

According to the respondent Van Staden told him during the Monday meeting that in the opinion of senior management consisting of himself, Burger and the assistant general manager, Mr Mike Edwards, he "was not making it and was sinking". Van Staden added that he had lost the support of his subordinates. Van Staden said that he and Burger would take a decision on his future that night and that he would be informed the next day.

According to Van Staden he asked the respondent at the start of their Monday meeting how he was coping and when the respondent replied that he thought he was coping well Van Staden said that he disagreed and he then proceeded to recite all the incidents which I have set out above and which he told the

respondent gave him cause for concern. Van Staden told the respondent that the staff was not prepared to support him any longer and that without such support he would not make the grade but would sink in the job. Van Staden told the respondent that it was clear from all that he had recounted that things could not continue as they were and that three options were available to management. The first option was to withdraw the respondent from operations and to try to train him first. Van Staden told the respondent that he did not think that any amount of training would improve his inadequacy of performance which were related to personality problems and a lack of judgment and insight. The second option was for the respondent to be allowed to retain his position and face disciplinary action which could result in his dismissal. Van Staden testified that he did not regard this as a viable option. The third option mentioned by Van Staden was voluntary retrenchment.

Van Staden telephoned Burger that evening and told him that "the situation cannot continue like this. It is not possible to continue with Mr Muller in the job". Burger agreed with his assessment of the situation and they discussed the possibility of offering the respondent a different position in the company as they both felt that he was not suited for his position as manager but that his talents lay elsewhere. They could not think of any vacant position the respondent could be moved to. Their discussion concluded with Burger leaving it to him to take whatever decision he saw fit.

According to the respondent Van Staden told him the next day that it had been decided that he should be summarily dismissed. He responded by asking whether there was any alternative and Van Staden then said that he could sign a letter requesting his voluntary retrenchment which would mean that he would receive an extra

month's salary plus the use of a car until 31 January 1994. Van Staden proceeded to hand him a letter to that effect dated 30 November 1993 which he signed. The respondent testified that it was never his intention to resign, particularly as it was shortly before the Christmas holidays and as he had a wife and three young children to support. He had no choice in the matter, however, and was forced to resign. After he had signed the letter Van Staden handed him a letter from the company, also dated 30 November 1993, granting his request for voluntary retrenchment.

Van Staden's version of the meeting with the respondent on 30 November 1993 was as follows. He said that their discussion covered virtually the same ground as that of the previous one. The respondent said that he still believed that he could make a success of his work and overcome his difficulties, to which Van Staden replied that they had reached the point where there was no

longer any time for that and that with the staff not supporting the respondent matters would only get worse. Van Staden testified that before the Tuesday meeting he had prepared himself fully regarding what the company could offer the respondent in the event of a voluntary retrenchment. He discussed these proposals with the respondent and at the end of the discussion the respondent said that he would accept a voluntary retrenchment. Van Staden then asked his secretary to draft the two letters to which I have referred. While the letters were being prepared the respondent went to say goodbye to the staff. He came back, shook hands with Van Staden and left.

Van Staden denied that he ever told the respondent that he was being summarily dismissed. He said that that was neither his nor the company's way of doing things. He further denied that the respondent was forced to sign the letter requesting his voluntary

retrenchment. From a reading of his evidence as a whole, however, there can be little doubt that he had taken a firm decision prior to the Tuesday meeting that the respondent's employment with the company should come to an end. He confronted the respondent with this as an accomplished fact thereby forcing the latter to accept voluntary retrenchment. It is clear from the evidence of both the respondent and Van Staden that the respondent at no stage wanted to terminate his employment with the company. Until the very last he maintained that he was coping and that, given a chance, he would meet the required standards and make a success of his job. He did not, therefore, agree to voluntary retrenchment of his own free will but was compelled to do so by the company. In the circumstances the LAC correctly held that the respondent was constructively dismissed by the company on 30 November 1993.

In holding that the respondent's dismissal was procedurally

unfair the LAC said that neither Van Staden nor Burger had given the respondent any guidance or advice in order to make him understand what was required of him. He was given no opportunity to improve. He was never warned nor was he given a reasonable ultimatum.

The LAC's finding that Van Staden and Burger failed to give the respondent any guidance or advice must relate to the period after 30 November 1993 as the uncontested evidence was that before that date Burger and particularly Van Staden spoke at length to the respondent about his work and what was required of him.

Van Staden's uncontested evidence was that he spoke to the respondent after each of the incidents which I have detailed above. Except for the Chantelle incident the respondent was unrepentant and would not concede that he had erred in any way. He would not listen to advice, but instead insisted that his actions were fully

justified. So, for example, with regard to the negotiations with the union, Van Staden more than once strongly urged the respondent to withdraw his proposal to the union as he (Van Staden) knew that it was unworkable. The respondent, however, remained adamant that the new system would work and that he would see to it that it worked. That this was the respondent's attitude throughout is borne out by what he himself said in the following passage during cross-examination relating to the Wool and Textiles incident:

> "Ek was 'n bestuurder gewees wat betaal is om 'n bestuurder te wees en as ek dink 'n ding is reg dan moet ek dit doen."

It must be accepted, therefore, that right up to 29 November 1993 the respondent was given guidance and advice by his superiors. He was also given an opportunity to state his case on a number of occasions when his superiors had reason to be

dissatisfied with his work performance. At no stage, however, was he specifically warned that unless his performance improved he was running the risk of dismissal. In *Performing Arts Council of the Transvaal v Paper Printing Wood and Allied Workers Union and Others* 1994 (2) SA 204 (A) it was held, in the context of dismissal for disciplinary reasons, that an employer should not act overhastily and that a reasonable ultimatum should first issue (at 216 B-D). The giving of an ultimatum is, however, not a legal requirement and the necessity for it depends on the facts of each case (see the majority judgment in *Council for Scientific and Industrial Research v Fijen,* 1996 (2) SA 1 (A) at 11 H-I).

The respondent was not a unionised employee but a senior manager. It was submitted on the company's behalf that he should for that reason alone have known what was required of him and have been capable of judging for himself whether he was meeting

those requirements. I am unable to agree with the contention, as a general proposition, that a senior employee such as the respondent does not have to be warned or given an opportunity for improvement. Fairness demands that in general he should be warned and given such opportunity, although a more flexible and lenient approach is adopted to the practical application of the dismissal guidelines in his case, and the degree and content of the warning may well differ from that which is required in the case of the unionised worker. See the article by Paul Pretorius called *Executive Dismissal for Incompetence and Incompatibility* in Labour Law News and Court Reports, Vol 2, No 8, March 1993.

Counsel further submitted that the respondent's performance, personality and attitude were such that a warning and an opportunity for improvement would have served no purpose. Again I am unable to agree. The respondent had only been employed by the

company for two months before his dismissal and he had been appointed from outside the transport industry. The undisputed evidence was that had he remained in the company's employ he would have received further training during the following year. It cannot therefore be said that as at the end of November 1993 his lack of judgment and insight of which Van Staden complained was so ingrained as to render any ultimatum an empty gesture and an exercise in futility. The same applies to the complaint that he was headstrong and unwilling to take advice.

In *James v Waltham Holy Cross Urban District Council* [1973] ICR 398 the following was said at 404 about the need for an ultimatum:

> "An employer should be very slow to dismiss upon the ground that the employee is incapable of performing the work which he is employed to do, without first telling the employee of the respects in which he is failing to do his job adequately, warning him of the possibility or likelihood of

> dismissal on this ground, and giving him an opportunity of improving his performance. But those employed in senior management may by the nature of their jobs be fully aware of what is required of them and fully capable of judging for themselves whether they are achieving that requirement. In such circumstances, the need for warning and an opportunity for improvement is much less apparent. Again, cases can arise in which the inadequacy of performance is so extreme that there must be an irredeemable incapability. In such circumstances, exceptional though they no doubt are, a warning and opportunity for improvement are of no benefit to the employee and may constitute an unfair burden on the business."

In all the circumstances of the present case fairness and good sense required that the respondent should have been given a ultimatum which was reasonable and explicit. It was common cause that this had not been done. I also think that the company acted with undue haste in effectively terminating the respondent's employment on 30 November 1993. The LAC's finding that the dismissal was procedurally unfair and for that reason constituted an

unfair labour practice cannot therefore be disturbed.

That leaves the appeal against the amount of compensation awarded to the respondent. It was not in issue that the respondent's total remuneration from his employment at the time of his dismissal was the sum of R179 428-00 per year. He was paid by the company to the end of January 1994. It was further not in issue that by 31 January 1995 when the proceedings before the Industrial Court concluded he had been unable to find permanent employment and had only earned the sum of R16 000-00 since his dismissal. The LAC sought to compensate the respondent for the financial loss caused by the dismissal and allowed him the loss of a full year's remuneration from which were deducted the sum of R16 000-00 as well as the sum of R3 710-00 in respect of a company car which the respondent had used after the termination of his employment.

In compensating the respondent for his financial loss the LAC adopted the approach which has consistently been followed by the Industrial Court and the LAC in awarding compensation to employees who have been unfairly dismissed. See the approach laid down in *Ferodo (Pty) Ltd v De Ruiter* (1993) 14 ILJ 974 (LAC) at 981 C-G and in the cases referred to in *Jones v KPMG Aiken and Peat Management Services (Pty) Ltd* (1996) 17 ILJ 693 (LAC) at 696 B-C and see also *Alert Employment Personnel (Pty) Ltd v Leech* (1993) 14 ILJ 655 (LAC) at 661 A - 662 D.

I do not propose, in this case, to examine whether that approach, which is derived from English law where it is squarely based on damages for breach of contract, is necessarily correct in the South African context with its emphasis on the broader concept of an unfair labour practice. Assuming, without endorsing, the

correctness of the LAC's approach in making its assessment of compensation, I am nevertheless of the view that it misdirected itself in failing to allow for the very real contingency that the respondent may have lost his employment with the company early in 1994. The company was entitled to terminate the employment relationship for valid reasons after following a fair procedure. It was common cause that by the end of November 1993 such valid reasons existed and that the company had taken a firm decision to terminate the respondent's employment. One cannot with certainty say that he would not have improved his performance, and hence his prospects of remaining in the company's employ after 30 November 1993; but taking all the circumstances into account, especially Burger and Van Staden's legitimate dissatisfaction, the likelihood is that he would have been dismissed in any event in the short term, even if he had been given another

opportunity to attempt to redeem himself. I am therefore of the opinion that it would be fair and reasonable to allow for an additional three months' remuneration after the end of January 1994, which amounts to R44 856-00. From this must be deducted the amount of R3 710-00 in respect of the use of the company car. Counsel for the appellant, while conceding that the amount of R44 856-00 was fair and reasonable, contended for certain further deductions. These were without merit and need not be specified here. The amount of R16 000-00 or the greater portion thereof, was most probably earned later during 1994 and should therefore not be deducted. In round figures the respondent should therefore have been awarded the amount of R41 000-00.

There remains the question of costs. The company has been unsuccessful as far as its appeal against the finding of an unfair labour practice is concerned. It has been partly successful in

obtaining a significant reduction in the award of compensation. Allowing for "the requirements of the law and fairness" (sec 17C (2) of the Act) and having regard to the considerations mentioned in *National Union of Mineworkers v East Rand Gold and Uranium Co Ltd,* 1992 (1) SA 700 (A) at 738 F - 739 J, I am of the view that no award of costs should be made in respect of the appeal to this Court. There is no reason to interfere with the costs order made by the LAC.

The following order is made :

1. The appeal succeeds in part to the extent that the compensation order made by the LAC is set aside and substituted by an order that the company pay compensation to the respondent in an amount of R41 000-00.

2. No order is made as to the costs of appeal.

W. VIVIER JA.

Eksteen JA)
F H Grosskopf JA)
Nienaber JA)
Van Coller AJA) Concur.