

IN THE LABOUR COURT OF SOUTH AFRICA(HELD AT CAPE TOWN)CASE NO:

C1132/01

DATE:

10-12-2001

In the matter between:

J J LE ROUX

Applicant

and

TELKOM LIMITED

Respondent

J U D G M E N T

WAGLAY, J:

1. The applicant has been employed by the respondent at a senior level since 1999. On 27 August 2001 the applicant was suspended with pay by the respondent and a disciplinary hearing was set down for 8 and 9 November 2001. The charge preferred against the applicant was that of dishonesty involving 95 alleged fraudulent transactions dating back to 1996. Applicant was subsequently charged criminally and granted bail in the amount of R15 000,00. In order to have sufficient time to peruse the relevant documentation supplied by the respondent to the applicant, the disciplinary hearing was postponed to 22 and 23 November 2001.
2. On 15 November 2001, applicant accepted a six month temporary position as a business manager with Spier Business Managements (Pty) Ltd (Spier). Respondent subsequent received a written fixed term contract from Spier as well as a request for a reference with a view to employing Applicant on a permanent basis. This respondent took to amount to repudiation of an

employment contract with applicant. Respondent thus did not see the need to continue with the disciplinary hearing and considered applicant to have effectively resigned.

3. On 22 November 2001, applicant applied to Court for a rule nisi on an ex parte basis. This curiously was granted. The rule was that respondent was to go ahead with the disciplinary enquiry as originally stated, reinstate the applicant's status of suspension on pay, provide documentation as requested and entertain the possibility of legal representation during the disciplinary hearing. It appears that no interim order was made. As such, the purpose for the hearing scheduled for 7 December (Friday) was to determine whether the terms of the rule nisi should be made final. However, applicant came to court not to make the order final but to extend the rule.
4. A rule nisi is an order calling for interested parties to show cause on a fixed date as to why the rule should be made final. It may or may not have interim effect and does not affect the ultimate onus in the case. While the Court is prepared to condone shortcomings in an application or excuse shortcomings in an application brought as a matter of urgency, on the return date a higher standard of compliance with the usual rules are required. It then becomes necessary for the Court to consider whether a case has been made out for the relief sought. A mere absence of opposition does not amount to implied consent to the terms of the order sought. On the contrary, as was held in Polyoak v CWIU(199) 20 ILJ 392 (LC) where the applicant makes out no case the respondent has the right to assume that the Court will arrive at a conclusion without the aid of argument from it (the respondent).
5. In this matter there are several problems with the application before the Court. It is evident that the applicant at the time of drawing the papers was employed by a new employer. Although counsel from the Bar states that applicant has resigned, there is no such evidence before me. In

any event, why should the fact that he has now resigned make a difference to the dispute as to whether applicant had resigned by his actions in taking up the employment or whether his contract of employment with the respondent is ongoing? In order to be granted the urgent relief on the applicant must show that the situation is urgent and that there is no prospects of substantial relief in due course. Applicant must show that the injustice he suffers outweighs on a balance of convenience the need for due process and observance of the usual time-frames of court procedures.

6. The applicant has failed to make out a case in this regard. On the papers before me, applicant currently has alternative employment, temporary with a view of being permanent. There are certainly no exceptional circumstances which justifies the order being made by this Court. In addition, applicant has the option of perusing an alternative remedy before the CCMA where he can lodge proceedings for unfair dismissal and claim reinstatement through the appropriate channels. The factual disputes at hand would be better solved in that forum , giving both parties an appropriate opportunity to state their respective cases.

7. In circumstances it is appropriate that the rule be dismissed and it is accordingly so ordered.

WAGLAY, J

FOR THE APPLICANT: ATTORNEYS HENNIE VAN ROOYEN

DATE OF HEARING AND JUDGMENT: 10 DECEMBER 2001 EDITED