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IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT BRAAMFONTEIN)

BRAAMFONTEIN CASE NO: JR187/01

2002-03-06

In the matter between

BLOEMCARE Applicant

and

ELA 1ST Respondent

COMMISSION FOR CONCILIATION

N 2ND Respondent

3RD Respondent

J U D G M E N T

Delivered on 6 March 2002

REVELAS J:

1. This is an application for review in terms of Section 145 of the Labour Relations Act 66 of 1995, ("the Act"). There is also a condonation application for the

late filing of this application for review. The applicant seeks to review an award made by the first respondent, the arbitrator, in favour of the third respondent, the erstwhile employee of the applicant.

1. 2. In her award, the arbitrator found that the third respondent was constructively dismissed when she tendered her resignation on 31 May 2000 in that the applicant had:

"Made continued employment intolerable for the employee."

3. The arbitrator awarded compensation in the amount of R46 637,50 to the third respondent.

4. The third respondent was employed on 1 July 1999 by the applicant as an administrative manager. She initially reported to a Mrs Le Roux, one of the respondent's directors, and later to Mr Du Plessis, another director, and she also had several interactions on a work level with a Mrs Van Niekerk. During November 1999 she was no longer required to perform certain bookkeeping functions and other duties. At some stage a reduction in her salary was also proposed but was not effected.

5. The arbitrator accepted that the employment relationship between the parties gradually deteriorated. Here I wish to make mention of the fact

that the arbitrator focussed somewhat extensively, compart to the remaining issues in the matter, on the question of the deteriorating relationship and the diminishing of certain functions.

6. It is common cause that the third respondent had a heavy workload and I accept that the third respondent's workload was diminished for operational reasons rather than a form of victimisation as she attempted to portray during the arbitration hearing.

1. 7. The arbitrator also made no finding, and should not have, that reduction in responsibilities justified the applicant's resignation.

8. It is further common cause that on 16 May 2000 the parties had a meeting to discuss certain work related issues. It is in dispute whether most of the conversation was about overtime or not. In any event, work related issues were discussed and the third respondent conceded that it was a productive meeting.

9. On 30 May 2000 Mr Du Plessis uttered words to the effect that:

"It is not 'fucking' acceptable that documentation is in this order."

10. It is not in dispute that the words were uttered, but it is in dispute that they were directed to the third

respondent. Mr Du Plessis denied that he directed the same foul language – this time in relation to a missing cheque – at the third respondent over the telephone the following day. The arbitrator accepted that Mr Du Plessis addressed the applicant in this fashion on both occasions.

11. This factual finding, which is a credibility finding, I do not criticise.

12. The third respondent did not file a grievance about the swearing. The arbitrator found that she was justified in electing rather to resign, than lodge a complaint. It is important that I should quote directly from the arbitrator's award in this regard:

"The employer could not adduce any evidence to justify the dismissal. Looking at both the employer's and the employee's conduct as whole I find that the employer made continued employment intolerable for the employee as the employee has:

1. Shown that Du Plessis was the stronger director of the two.

2. That she reported to Du Plessis, and

3. That Le Roux's position was parallel to that of Du Plessis.

I find that the employee was justified in not lodging a grievance about Du Plessis' conduct to Le Roux. The employee's dismissal was therefore procedurally and substantially unfair."

13. The applicant contends that the third respondent should have

exhausted other alternatives before considering resignation. There could have been a range of alternatives. There was an offer by the applicant to have a meeting to resolve the issue right after the resignation.

14. The third respondent believed that such a meeting would be to no avail. By this time she had instructed an attorney who had advised her. Of this important fact the arbitrator makes no mention.

15. In *Carephone (Pty) Ltd v Marcus N.O. & Others* 1998 19 ILJ 1425 (LOC) the Labour Appeal Court applied the constitutional directive that an arbitration award of the arbitrator was required to be:

"Justifiable in relation to the reason given for it."

(At paragraph 31) The Labour Appeal Court also reasoned that:

"**In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will almost inevitably involve a consideration of 'the merits' of the matter in some way or another. As long as the Judge determining these issues is aware he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof but to determine whether the outcome**

is rationally justifiable the process would be in order."

16. No employee should be expected to tolerate abusive language or any other form of abuse. It is not acceptable for employers to use the word 'fuck' in front of employees. The word is still offensive to some people, even though it is a word that has lately become integrated into the vocabularies of many. Whether an employee is entitled to be compensated upon resignation as a result of this word being used by an employer, will depend on the facts.

17. The third respondent is an elderly lady and she found it offensive. There was corroborative evidence by her husband that the word in question was not used not in their home and that they both found it offensive.

18. In *Pretoria Society for the Care of the Retarded v Loots* 1997 6 BLLR 71 (LAC) it was held:

1. **"When an employee resigned or terminated contract as a result of constructive dismissal, such an employee is in fact indicating that the situation has become so unbearable that the employee cannot fulfil what is the employee's most important function, namely to work. The employee is in effect saying that he or she would have carried on working indefinitely had the unbearable situation not been created. She does so on the basis that she does not believe that the employer will ever reform or abandon the pattern of creating**

an unbearable work environment. If she is wrong in this assumption and the employer proves that her fears were unfounded then she has not been constructively dismissed and her conduct proves that she has in fact resigned.. Where the employee seeks compensation the Court looks at whether the employee was constructively dismissed. A part of that inquiry may well be whether the employee's evidence should be believed or whether the employer's evidence which is to the effect that she actually resigned, should carry the day. The inquiry then becomes, whether the appellant [the employer] without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and the employee. The Court's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it."

19. Whether the employer has behaved reasonably and the whether the employee's perception of the employer's conduct was reasonable is an objective test. That is also clear from the aforesaid judgment.

20. The third respondent was of the view that if she were to lodge a grievance or lay a complaint with Mr Le Roux against Mr Du Plessis, she would be victimised because her four superiors simply brooked no criticism.

21. The third respondent would have been wiser to have lodged a complaint. If matters did not improve after she had made her position clear, she would be perfectly entitled to resign and that could have constituted a constructive dismissal.

1. 22. It is also of great importance in this matter, that the employer sought to rectify the situation. Having chosen to simply resign, I do not believe the third respondent is able to show that she was coerced involuntarily to resign. There was no basis on which she could have reasonably accepted that the situation would continue. That may have been so with regard to the working problems which is more of a performance or operational requirements issue, than the breaking down of the employment relationship.

23. Mr Du Plessis swore twice in two days. No other incidents of swearing were referred to. It appeared that he had done so when he was somewhat angry. There was no indication that the third respondent would be subjected to these swear words for the rest of her employment relationship with the respondent. The situation could have been rectified by lodging a complaint.

The applicant at least attempted to rectify the situation.

24 In my view, the award was punitive and unfair towards the applicant. This award creates a situation where an employee who hears two swear words, may claim 12 months' compensation for constructive dismissal, despite the employer's attempt to make good the situation. Such a situation should not be permitted. (See: *C.W.I.U. v Johnson and Johnson (Pty) Ltd (1999) 20 ILJ 89 (LAC)*).

24. The arbitrator also accepted the applicant's contention that the words had a sexual connotation. It is difficult for me to understand why, particularly in the context the words were used, these words imported such a meaning.

25. The arbitrator did not apply her mind to all the evidence before her and consequently her award falls to be set aside. I do not believe that it would serve any purpose to remit the matter to the CCMA and I can substitute the arbitrator's finding with my own order.

26. Consequently I make the following order:

1. The late filing of the review application is condoned.
2. The award of the second respondent dated 7 December 2000 is set aside.
3. The finding of the first respondent is substituted with the following:

"The third respondent voluntarily resigned from the

applicant's employ and was not dismissed."

4. The applicant is to pay the respondent's costs wasted costs incurred for the postponement on 8 February 2002.

27. I make no order as to the costs of this application.

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E. Revelas