Sneller Verbatim/idm

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: JS201/01

2002-08-15

In the matter between

CELESTE AVRIL CORNS Applicant

and

ADELKLOOF DRANKWINKEL C.C.

t/a CELLARS DRANKWINKEL Respondent

J U D G M E N T

DELIVERED ON 20 AUGUST 2002

REVELAS J:

1. The applicant was dismissed on 15 December 2000 due to the alleged operational circumstances of the respondent. She is 31 years old and was employed as a floor manager.

1. 2. On the day of her dismissal, the applicant was requested to accompany Mr Van der Merwe, the manager of the respondent, a close corporation, to a building in

Kimberley. She had never been there before, and as it turned out, they were on their way to the offices of an employer's organisation named the Labour Code Determination for Small Enterprise Employers of South Africa ("SEESA"). Mr Van der Merwe is a member of SEESA and who also represented the respondent in this matter. On their arrival, the applicant was introduced to Mr Johan Viljoen of SEESA. Mr Van der Merwe then raised the issue that he could no longer afford the applicant. He subsequently left the office and the applicant was left with Mr Viljoen. It is common cause that when the applicant realised that her services were being terminated, she cried and was very upset. Mr Viljoen suggested that she go to the bathroom, which she did, and returned 15 minutes later. Mr Viljoen testified that he offered a postponement of the meeting to another day because of her emotional state, which she declined. He offered her a voluntary retrenchment package comprising of the following:

1 one week's remuneration for each year of completed service (R900,00);

2 accumulated leave pay (R1 360,00);

3 pro rata bonus (R300,00);

4 one week's *ex gratia* payment (R450,00);

5 notice pay (R1 800,00);

6 extra (R500,00).

The total is R5 310,00.

3. Mr Viljoen also required the applicant to sign a voluntary retrenchment agreement, which was a standard application form. She signed this document, the relevant part of which reads as follows:

"Ek doen hiermee aansoek om 'n vrywillige afleggingspakket soos aangebied deur die werkgewer.

Ek aanvaar hiermee die pakket soos aangebied en erken dit as volle en finale betaling van enige en alle eise tussen myself en die werkgewer.

Ek besef dat die rede waarom die afleggingspakket aangebied is verband hou met die werkgewer se heersende omstandighede. Ek wil egter wel in aanmerking kom vir herindiensneming sou die werkgewer se posisie verbeter en 'n pos waarvoor ek geskik sal wees, beskikbaar raak.

Ek sal my dienste beëindig op 15 Desember 2000."

The document is dated 15 December.

4. It is common cause between the parties that the applicant asked to phone her mother for advice. She said that she did not understand what was going on, and I presume she meant that she did not understand her rights. Her mother advised her to sign the agreement, which she did. According to her, she believed that Mr Van der Merwe did not like her as a person, and her

mother knew thereof, and apparently that was the basis of her advice to her daughter to sign the agreement. Thereafter Mr Van der Merwe came in and gave her her cheque, which she banked the same day.

5. The applicant referred her dispute to the Commission for Conciliation, Mediation and Arbitration, (Athe CCMA@), the following Monday.

1. 6. The applicant testified that during the meeting she was in shock and had signed the document under pressure because Mr Viljoen said he was in a hurry and had to be back in Upington that night. Mr Viljoen disputed that he ever made such a statement, and he stated that he could prove that he slept in a guest house in Kimberley that night, as he had to attend a function that evening. However, what is peculiar is that the applicant met Mr Viljoen that day for the first time in the SEESA office in Kimberley. How would she have known that he was resident in Upington?

7. Mr Viljoen gave evidence that he followed all the correct procedures in terms of section 189 of the Labour Relations Act 66 of 1995 ("the Act"). Yet he did not provide one single fact or make reference to any alternatives or selection criteria that he raised with her. No proper evidence was provided by him to

support his statement to that effect. He could not say what he had told her. He said that he had made notes of the consultation. During further questioning it emerged that these notes only related to amounts contained in the package, and although it was stated in court that he had the minutes with him, there were no minutes produced. It appeared that he had no such minutes, or ever had such minutes.

1. 8. I am unconvinced that there was any attempt to comply with the obligations placed upon an employer by section 189 of the Act. The applicant was told that her services had to be terminated on 15 December 2000. She heard about this for the first time on that day. Yet the document setting out her package is dated 11 December 2000, four days previously, and is titled "Kennisgewing van aflegging". She received no such notice, and she was taken to Mr Viljoen unprepared and unrepresented. The document dated 11 December 2000 also refers to her package as an "afdankings-pakket".

9. Mr Van der Merwe, upon a request by me to explain why he had not conducted the consultation himself, answered that he thought it would be better if someone else conducted the proceedings, to alleviate the unpleasantness thereof. He said that the bottle store was under financial pressure and he then phoned Mr

Viljoen for assistance. He also gave evidence that the applicant was the highest paid employee, and it is apparently for that reason that she was identified for retrenchment. In evidence, however, the attorney appearing on behalf of the applicant put to Mr Van der Merwe a pay slip which he admitted was the pay slip of a co-employee, Adri Barnard. This pay slip reflected that Ms Barnard was paid R1 800,00 by the respondent per month, which is the same salary earned by the applicant. This would indicate further, apart from Mr Van der Merwe's credibility on the matter, that no proper selection criteria was followed, let alone alternatives for retrenchment were discussed.

10. Mr Viljoen could hardly have complied with any of the requirements of section 189 of the Act, because he simply could not have had sufficient information at his disposal about the respondent's business to conduct a proper consultation. He had arrived in Kimberley from Upington and spent less than an hour with the applicant alone in an office.

1. 11. I gained the strong impression that Mr Van der Merwe wished to retrench the applicant as expeditiously as possible, and consequently obtained the services of his employer's organisation, who only had his interest at heart, to attend to his problems.

12. According to the pre-trial minute (paragraph (iv) on page 27 of the bundle of pleadings, the parties described the issues which the court had to decide as "**whether operational requirements necessitated dismissal (and)**

whether the procedure that led to the consensual termination of the employment was fair".

13. The respondent argued in a special plea that the termination of the applicant's services was consensual, as she had signed the agreement in question. Any shortcomings in the process, which was conceded by the respondent's advocate or counsel for the respondent, that preceded the agreement was cured by the voluntary retrenchment package agreement.

1. 14. In my view, and for the reasons set out above, the respondent did not discharge its onus of proving that the dismissal was for a valid reason. The procedure was entirely unfair, high-handed and flawed. In *Bekker v Nationwide Airlines (Pty) Ltd* 1998 2 BLLR 139 (LC) Landman J held that where an agreement of this nature is reached as a form of settling a retrenchment, the agreement must be preceded by consultation. In this matter, the consultation process was so flawed that it amounted to no consultation at all. The applicant was taken to a building where she was confronted by a

perfect stranger with the news that she had to be retrenched. Mr Viljoen had a standardised agreement ready at hand. Even if she declined the postponement of the meeting, Mr Viljoen says he offered, it was clear that she would eventually be retrenched whether, at this meeting or the next meeting. The circumstances in which her signature was procured were oppressive. She was in shock, needed advice, followed her mother's advice over the telephone in circumstances where no one had her interests at heart.

15. The main objective of that meeting was to procure the applicant's signature on the agreement, and to circumvent the requirements of section 189 of the Act. The decision to dismiss was taken four days ago.

16. From the respondent's point of view there was really nothing to discuss, and Mr Viljoen did nothing to discuss, other than the amounts set out in the retrenchment package. In the end he conceded, when asked about the minutes, the only notes he made were in relation to the amounts to be paid. All that was discussed was the package.

17. In my view, an agreement obtained in such unfair circumstances amounts to a nullity. I therefore find that the dismissal was both procedurally and substantively unfair. The applicant should be

reinstated.

1. 18. The applicant's attorney argued that I should make a punitive cost order against the respondent for the manner in which the case was conducted, particularly with reference to the postponement obtained for the Friday to obtain the presence of Mr Viljoen. I do not agree with the applicant's attorney that this postponement, the nature of which regularly occurs in courts, should invite that type of cost order. The respondent did tender the wasted costs.

19. In the circumstances I make the following order:

1 The applicant is reinstated in the employ of the respondent on the same terms and conditions which were applicable to her on the date her services were terminated.

2 The reinstatement shall be with retrospective effect, but limited to 12 months' payment.

3 The respondent is to pay the applicant's costs of suit on the scale as between party and party.

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E. Revelas