

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN CAPE TOWN**

NOT REPORTABLE

Case no: C593/2007

In the matter between:

ADOLF VAN ROOYEN

APPLICANT

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

1ST RESPONDENT

COMMISSIONER RUGGIERO NO

2ND RESPONDENT

DENEPET (PTY) T/A LELIEFONTEIN

BOARDING KENNELS

3RD RESPONDENT

JUDGEMENT

CHEADLE HJ

Introduction

[1] This is an application to review the award issued by the 2nd Respondent (the commissioner) to the effect that his employer, the 3rd Respondent (the employer), did not terminate his employment and accordingly his termination did not constitute a dismissal for the purposes of Chapter X of the LRA.

[2] The Applicant commenced employment in 1997 as a general worker. He resides on the premises with his wife and children. His version is that on 7 July 2007 he had a fight with his stepson in which he sustained a panga wound to his leg. He says that he raised this with his employer and asked for two days leave in order to sort out his problems. After signing what he thought was an application for leave,

he took two days leave. His wife was told later that day that he had resigned and cancelled the lease.

- [3] The employer's version was that he said he wanted to leave his wife, resign from his job and go and live with his sister. He insisted on resigning despite being asked whether he was sure that he wanted to do this. He insisted and, signed a resignation letter and, a letter cancelling the lease and collected his UIF Card and his will, which had been held in the safe at the office. He returned two days later and asked for his job back but was refused because he had left them at a peak period of their business.
- [4] The Applicant referred a dispute to the CCMA and on 21 September 2007 the arbitration was held. The Applicant and his wife gave evidence on his behalf. Mr Fourie, a director of the 3rd Respondent, his wife and a Ms Coetzee, an employee, gave evidence on behalf of the, employer. The applicant was represented by a union official, a Mr Tuddie, and Mr Fourie represented the 3rd Respondent.
- [5] After summarising the evidence, the commissioner concluded on the balance of probabilities 'the Applicant came into the office after a fight with his stepson and said that he wanted to resign and that he was going to leave his wife and move in with his sister' and accordingly that the Applicant 'failed to prove on the balance of probabilities that a dismissal took place'.
- [6] The Applicant then launched a review of the award under section 145 of the LRA on 23 November 2007. The employer opposed the application. After the record was filed by the 1st Respondent, the Applicant stood by its notice of motion.
- [7] The opposed application was set down for 3 December 2008 when the matter was postponed sine die to enable the Applicant to obtain a pro bono attorney and for the matter to be set down in the second term of 2009. On 17 November 2009, the employer applied to have the application to review dismissed on grounds that the Applicant had

failed to prosecute his claim. That application was set down for hearing on 17 February 2010. At that hearing, it was agreed between the parties that the application be postponed to 17 March 2010 and that the review application be enrolled on the same day with costs to stand over. The Applicant filed an opposing affidavit on 16 March 2007, the day before the hearing.

[8] On the same day, the Applicant filed an application for an order 'condoning for the outstanding issue of obtaining and appointing a pro bono attorney to comply with the order made by the Honourable Justice Francis on 3 December 2008'. This application was supported by an affidavit of a Michael Jacobs who states that he is the Applicant's representative and advisor. According to the official the Applicant secured the services of a pro bono attorney in December 2008. Nothing was done until the employer launched its application to have the review application dismissed in November 2009, a year later. The affidavit then details the attempts to contact the attorney and the attorney's subsequent decision not to represent the Applicant. The application and affidavit was only served on the employer at the hearing on 17 March.

[9] The object of the 'condonation application' was to secure another postponement. It was refused. This matter has dragged on for over two years. The Applicant was given ample opportunity to secure legal representation since the order given by Francis J in December 2008. He secured that representation as early as December 2008. He did nothing to prosecute his application to review until the employer initiated its application to have the review dismissed on 17 November 2009. The Applicant knew on 17 February 2010 that the matter was enrolled for the hearing on 17 March.

Grounds of review

[10] There are three applications before me. The first is the Applicant's application to review. The second is the employer's application to have that application dismissed on grounds that the Applicant has

failed to prosecute it timeously. The third is an application to have the commissioner's award made an order of court. Since I was not addressed on the second and third applications at the hearing and the Applicant was accordingly not given an opportunity to respond in argument to these applications, no order has been made in respect of them.

[11] The Applicant's grounds of review are contained in the handwritten notes attached as part of his founding affidavit. They can be summarised as follows:

11.1 The commissioner's failure to take into account the fact that Mr Fourie lied under oath;

11.2 The commissioner's failure to take into account that Ms Coetzee, an employee witness corroborated the evidence given by the Applicant and his wife that Mr Fourie stated that he had dismissed the Applicant;

11.3 The finding that the employer did not have any devious intent to get rid of the Applicant in view of the above and his testimony that the employer wanted the Applicant and his family off the farm;

11.4 The failure to take proper account of his illiteracy;

11.5 The failure to take proper account of the fact that the employer's version is so illogical that it cannot be a probable version.

[11] There are two bundles of paginated documents. The pleading bundle is referred to below as P followed by the page number and the paragraph number if there is one. The bundle containing the record is referred to as R also followed by the page number and the number of the paragraph number if numbered.

The first ground of review

[12] The first ground of review is the commissioner's failure to take into account the fact that Mr Fourie lied under oath. Mrs Van Rooyen, the Applicant's wife, stated in her evidence that Mr Fourie had said the following: '...Adolf ek is jammer ek het you bedank maar ek kan nie anderste nie die saak is alreeds oorgegee ons moet uitbakei...' (R41.13). The Applicant anchors this discussion on the Tuesday the 9th of July (when on his version he returned from leave) in which case there was no referral to the CCMA. In paragraph 27 of his award the commissioner records Mrs Van Rooyen's testimony to that effect. But later Mr Fourie anchors this discussion after he returns from holiday during which he received service of the referral of the dispute to the CCMA, namely on the 7th of August (R45.1-3). Although Mrs Van Rooyen is not asked to respond to this statement, she is aware of the version – R41.4-7.

[13] It is also evident from her testimony that she is phoned while visiting a prison by Mrs Fourie and asked to come in and discuss the matter. She goes on to state that she does not go in but that the next morning both of them go and listen but do not give an answer. Although this conversation is discussed in the context of the conversation on Tuesday the 9th of July, it is quite clear from Mrs Van Rooyen's testimony that there is another conversation after the dispute had been referred to the CCMA. Although the commissioner does not deal with it specifically, it is apparent from the record that there were two conversations at different dates. Neither Mrs Fourie nor Mr Fourie was cross examined on the matter. The Applicant notes in his affidavit that his trade union representative did not properly present his case but that failure cannot be laid at the door of the commissioner. There is no substance to this ground of review.

The second ground of review

[14] The second ground is the commissioner's failure to take into account that Ms Coetzee corroborated the evidence of the Applicant and his wife that Mr Fourie said that he had dismissed the Applicant. He appears to refer to her testimony at R91.11-15 in which she says: '...op die ou end is hy gevra om of hy wil bedank'. When cross examined over this statement, she equivocated claiming not to remember precisely what she said. The Applicant claims that this

equivocation is a result of Mr Fourie's signalling to the witness his disapproval leading the commissioner to reprimand him – P8.

[15] There is no record of such a reprimand during Ms Coetzee's testimony. The only reference is to an objection raised by the Mr Tuddies that Mr Fourie was shaking his head during the testimony of Mrs Fourie – R79.6-16. It is also important to note that Mr Fourie responded to the objection stating that he has a disability which was noted by the commissioner. Moreover, Mrs Fourie did ask the Applicant if he wanted to resign. The only difference between Ms Coetzee's initial statement and Mrs Fourie's testimony is when the question was asked. In any event the commissioner took account of the vague nature of Ms Coetzee's testimony in his analysis – P24.60.

[16] There is accordingly no substance to the second ground of review.

Third ground of review

[17] The Applicant contends that the commissioner's finding that the employer was not devious is inconsistent with the evidence before him. That evidence is that Mr Fourie lied (the first ground), Mr Fourie interfered with a witness (part of the second ground) and that Mr Fourie wanted to have him and his family removed from the farm. I have found the first two grounds to be unsubstantiated. In so far as the third piece of evidence is concerned, the Applicant did not lead any evidence of the employer's intention to rid himself of the Applicant and his family. There is accordingly no substance to this ground of review.

Fourth ground of review

[18] The Applicant states that the commissioner failed to take proper account of his illiteracy. In the commissioner reasons for the award, he states that the 'extent of his illiteracy would not prevent him from distinguishing between a formal leave application form which is a full A4 page, compared to the letter of resignation which is only a few

lines' and that the Applicant signed other forms namely a UIF form and his testimonial – P25.62.

[19] It is clear from his reasoning that he does not rely on the employee's illiteracy so much (although there was testimony that he was not completely illiterate) as relying on what the documents looked like and more particularly the fact that he signed several documents when an application for leave would only have required the signature of one document. It should also be borne in mind that the commissioner accepted Mrs Fourie's testimony, corroborated by Ms Coetzee, that the resignation letter was read out to him before he signed it.

[20] There is accordingly no basis for a challenge on this ground.

Fifth ground of review

[21] The Applicant argues that the employer's version is so illogical that the commissioner should have found it improbable on its own terms. But the fact that it was an irrational decision does not make it improbable. Indeed there is a logic linking the injury caused by his stepson, leaving his wife and his work and moving in with his sister. The circumstances of the assault make such an irrational response quite probable. Moreover, the commissioner deals with the irrationality – he states that he may have come to a different conclusion had the Applicant stated that he had resigned in anger and that it would have been unfair for the 3rd Respondent to have accepted his resignation in those circumstances – P25.64. But that was not the case that the Applicant advanced.

[22] Although the employer has been successful in opposing the Application to review the commissioner's award, a costs order against employees may have chilling effect on employees' access to courts. I accordingly decline to make an order as to costs.

[23] The Application to review is dismissed with no order as to costs.

CHEADLE AJ

Date of Hearing : 17/03/2010

Date of Judgment : 26/03/2010

Appearances

For the Applicant : Mr Van Rooyen in person

For the Respondent : Adv J Rysbergen

Instructed by : Byron Nicholas