

SOUTH AFRICA / JUDGMENT

African Realty Trust (Pty) Limited v Maake and Others (R1822/2010) [2012] ZALCJHB 187 (26 October 2012)

[2012] ZALCJHB 187

COURT

Labour Court Johannesburg

BEFORE

Coetzee AJ

CASE / FILE NUMBER

R1822/2010

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: R1822/2010

DATE: 26 OCTOBER 2012

REPORTABLE

In the matter between

AFRICAN REALTY TRUST (Pty) LimitedApplicant

And

MAAKE J S.....First Respondent

CCMA.....Second Respondent

PAUL CORBETT.....Third Respondent

Date of hearing: 26/10/2012

Date of judgment: 26/10/2012

Summary: Review application – oral resignation or dismissal – test

- jurisdiction of CCMA – employee orally resigned.

EX TEMPORE JUDGMENT

COETZEE, AJ

- [1] This is an application to review and set aside an arbitration award under case number LP5798/2008, dated 16 June 2010, which was in favour of the third respondent holding that he was unfairly dismissed.
- [2] The third respondent, Mr Paul Corbett ("Corbett"), was employed by the applicant, African Realty Trust ("the company"), as a technologist. The company on the one hand claimed that Corbett had resigned. Corbett on the other hand claimed that he was dismissed and he thus carried the onus to prove the dismissal.
- [3] The company's main ground of review is that the Commissioner excluded material evidence and relied solely on an interpretation of the termination clause in the contract of employment to arrive at a finding of unfairness which is based on process related unfairness, but it also affected the outcome of the arbitration award in favour of Corbett.
- [4] The company argues that the Commissioner approached the evidence on a narrow basis and determined the issue simply on an interpretation of the contract of employment in stead of taking into account and giving consideration to all the evidence.
- [5] It is clear as the law currently stands, that process related unfairness must relate to material aspects of the evidence or the issues excluded or ignored by the Commissioner.
- [6] The company also raised a jurisdictional point that the CCMA did not have jurisdiction to continue with the arbitration, as the dispute between the parties had become settled in terms of a settlement agreement that was concluded after the first day of the arbitration in an ancillary matter. In view of the finding below it is not necessary to deal with this dispute.

Summary of the facts

- [7] Corbett, on 9 August 2008, a Saturday morning, according to Van Wyngaardt a witness for the company and the person to whom Corbett

reported, had a discussion with Van Wyngaardt. Van Wyngaardt is the company's general manager. The evidence is that there is a direct reporting line from Corbett to the general manager Van Wyngaardt.

- [8] According to Van Wyngaardt, Corbett during this conversation announced his resignation with immediate effect. The telephone

reception was poor and the discussion short. Corbett in his evidence could not recall any such telephonic discussion with Van Wyngaardt on the Saturday. He did not outright deny such a discussion and stated that he from time to time phoned Van Wyngaardt.

- [9] The telephone records that were handed in by Van Wyngaardt did not reflect that particular call, as it only reflected outgoing calls and not incoming calls. Corbett elected not to hand in his telephone records in order to disprove such a call.

- [10] Following the call on Saturday, 9 August 2008, Corbett was absent from work for the period from Monday 11 August to Friday 15 August. During this week a few things occurred. Corbett telephoned Van Wyngaardt during the morning of Tuesday 12 August, which call Van Wyngaardt returned as he was unavailable to take the call at the time Corbett phoned.
- [11] Van Wyngaardt when returning the call, on his version, conveyed to Corbett that Corbett could not leave immediately and that he had to serve his notice period as the resignation came in a very busy month. Corbett confirms the telephonic discussion, but denies during the discussion informing Van Wyngaardt that he was leaving the company.
- [12] It is common cause that during this call, Corbett did not inform Van Wyngaardt of his illness. According to Corbett he was at that point in time in bed because of the illness and could only attend at a medical practitioner on the Thursday two days later.
- [13] On the Thursday, in a telephone conversation between Van Wyngaardt and Me Du Bruin, who is the CEO of the company, and other members of company's management team, all in Australia, it was agreed that the resignation should be accepted in writing. Van Wyngaardt had to record the resignation.
- [14] Corbett did not report for duty after the call on Tuesday 12 August
2008. Van Wyngaardt called Corbett on the Wednesday when Corbett's phone remained unanswered.
- [15] Corbett on Thursday for the first time consulted a medical practitioner regarding his illness. The sick note produced by the
- practitioner had never been handed to the company who only became aware of it during the CCMA proceedings.
- [16] On the sick note the commencement date of his illness was changed from 14 August 2008 to 11 August 2008. An explanation was tendered for this change. According to Corbett he had already informed Andries on the 13th that he was ill. He then testified 1 that on the Monday he had informed his laboratory supervisor one Kenneth Blessie of his illness.
- [17] It remains unlikely that he had informed these persons of the reason for his absence as his direct reporting line was to Van Wyngaardt to whom he also spoke on the preceding Saturday.
- [18] At about 17:00 on Thursday, 14 August, as Van Wyngaardt was about to write the letter accepting the resignation, Corbett phoned him to inform him that he was consulting a medical practitioner as he was indisposed and that he would be resuming his duties soon.
- [19] Van Wyngaardt in his evidence expressed his surprise towards Corbett as according to him Corbett had resigned and had not reported for duty for four days without any explanation other than his oral resignation, to which Corbett then replied that it would be his word against that of Van Wyngaardt as to whether he had actually resigned.

[20] Corbett later denied that he had said to Van Wyngaardt that it would be his word against that of Van Wyngaardt.

[21] On Friday 15 August, with the permission of the chief executive officer, Van Wyngaardt in writing informed Corbett that the

resignation was accepted and that he would be paid in lieu of notice and did not have to serve his notice period.

[22] This letter was hand delivered to the home of Corbett. The letter was pushed under the door as nobody opened when they knocked on the door. According to Corbett's evidence in the arbitration, he heard the knock on the door, he got up out of bed and then recognised the voice of Van Wyngaardt but elected not to respond or to open the door.

[23] His explanation for adopting this attitude was that he was off sick and did not have to speak to Van Wyngaardt. Van Wyngaardt on his version was at that point in time unaware of the illness of Corbett. Corbett on the same day, according to his evidence, read the letter and interpreted the letter to be a termination of his employment on the instance of the company.

[24] The company was dismissing him. That was his conclusion. Corbett conceded that he did not make any enquiries as to why the company would have sent him a letter accepting his resignation, if there was no talk of any resignation. According to him, it was a complete fabrication.

[25] Corbett twice confirmed 2 that he had not taken up this "fabrication" of the dismissal with his employer in order to get an explanation from the

company.

[26] The probabilities favour 3r the version of the company in this regard in that it could reasonably be expected of Corbett when receiving a letter out of the blue, confirming a resignation that never took place, his reaction would have been to immediately contact the company and speak to the company's representatives and say what is going on here.

[27] Corbett confirms that he did not think it prudent to take the dismissal, this "fabrication", up with the HR manager or with the CEO and this is his explanation.

‘Andries is general manager and if he made a terribly wrong decision, well that is the decision that he will have to live with by dismissing me’”

[28] Van Wyngaardt in cross-examination testified that Corbett phoned him on the Friday confirming receipt of the letter. This was an opportunity for Corbett to request an explanation as to why he had been dismissed. The fact that Corbett phoned Van Wyngaardt, shows that they were on speaking terms and it is quite surprising that he did not raise this "fabrication" with Van Wyngaardt. This was an ideal opportunity to do so and the fact that he did not do so warrants the inference that his version is not to be accepted.

[29] Van Wyngaardt confirmed that during this discussion, Corbett had said that he would be taking the matter further. For Van Wyngaardt this made sense, as Corbett had by then turned around and for all practical purposes, indicated that he would make Van Wyngaardt out to be a liar when the latter would say Corbett had resigned.

[30] This conversation follows after the discussion on the Thursday when Corbett according to Van Wyngaardt had told him that it would be his word against that of Corbett.

[31] On Monday 18 August, Van Wyngaardt received an e-mail communication from Corbett in response to his letter confirming the resignation

recording that Corbett had 'accepted the letter'.

[32] This e-mail also contained information which prompted the company to apply for an Anton Piller order. This again, on Monday 18 August, was a further opportunity for Corbett in the email to question the alleged resignation which he called a "fabrication",

something he did not do.

[33] His e-mail does not necessarily mean that he accepted the fact that he was alleged to have resigned but it clearly demonstrates that he did not take issue with his employer for alleging a resignation in the absence of one. On the probabilities he did not raise it at the time because he was going to rely upon 'the word of the one against the other'.

[34] Corbett did not report for duty on Monday, 18 August, and there were no further communications between the parties, except in respect of his retirement benefits. In the meantime the Anton Piller case was settled which gave rise to further events in the arbitration proceedings and as I have stated, I do not need to deal with those.

[35] The Human Resources Department of the company completed the Momentum Provident Fund Withdrawal Form, scanned and emailed the form to Corbett who then signed the form after having completed some missing information. On page 4 of this form, it is clearly stated that the reason for the withdrawal was that Corbett had resigned. He did not change this statement on the form.

[36] Corbett nevertheless signed the form, confirming that the content of the form was correct. Corbett did not challenge the fact that the form reflected that he had resigned. The transcript shows the following:

'Mr Jacobs: Do you agree with me that if you stated there, if you changed that to dismissal, it would not have effected your pension

fund payment?

Mr Corbett: Yes'

[37] Corbett later on changed his explanation and said the change to reflect a dismissal might have affected his pension pay-out. This seems like a feeble after the event explanation.

[38] Corbett for the first time on 30 September 2008, in a letter challenged the allegation that he had resigned. This was also the date when he referred the matter to the CCMA. It is quite probable that by that time he had received advice and thus the protestation as to what had occurred.

[39] Corbett previously had resigned on written notice, but that resignation was not implemented. It was common cause that the company

had no problem with Corbett and that Corbett had no problem with Van Wyngaardt, Loubser or any of the other people working at the company.

[40] It is thus improbable that the company would have fabricated the acceptance letter for no reason at all and at the same time it is probable that if Corbett had any quarrel with the company about the company alleging a resignation, he would have taken it up with any of a number of people.

[41] The company, when he first resigned, persuaded Corbett to withdraw the notice of termination which shows that the company wanted him to work for it. The first written resignation is also an indication that Corbett earlier wanted to leave, was persuaded to stay on and in August 2008, probably again of his own accord decided to leave.

[42] It also demonstrates that he knew his contract requires a written resignation. This does not convincingly show that Corbett was at the time of the view that he could not also resign orally. Corbett's contract of employment in respect of the resignation provides as follows:

'This agreement may be terminated on written notice of one calendar month, given by the company or yourself to the other. You will not be entitled to take leave during your notice period.'

Assessment of the facts

[43] The Commissioner considered these events and whether the 'purported telephonic resignation' occurred. The Commissioner held that Van Wyngaardt's testimony and the evidence that a telephone call on Saturday in fact took place were in itself as facts on their own, inconclusive of whether Corbett had resigned.

[44] One cannot fault the Commissioner for this finding, except that these facts should not have been considered in isolation. The Commissioner then, in respect of all the individual instances relied upon by Corbett to prove or disprove Corbett's resignation remarks the following in paragraph 7.4.1 of the arbitration award:

'I ought to make it clear at the outset, that none of the foregoing scenarios, does when considered individually, becomes conclusive of the existence of the purported resignation. At least, each of them only services (sic) to attack the credibility of Corbett's

version, with an ultimate purpose of proving the existence of the purported resignation. However, cumulatively considered, they have the potential of succeeding in doing so. It will however, soon be apparent hereafter that a proper construction of the termination

clause in the employment contract, would prove decisive in the outcome of there proceedings. In spite of this being against the

cumulative effect of these other scenarios, sketched out elsewhere above and in particular the Provident Fund Pension issue.

Bearing in mind the foregoing observations, I however propose the juxtapose them with what, in my considered opinion is the correct construction supposed to be placed on the stipulations of clause 16.1 of the employment contract which, once again, in my considered opinion is vital to the determination of the question of whether or not there was a resignation by the applicant. In spite of the scenarios painted out elsewhere above by the respondent.'

- [45] These individual aspects referred to are now dealt with below. Du Bruin advised Van Wyngaardt to confirm the resignation. This advice could mean that the company wanted certainty on the resignation as there was uncertainty at that point in time, due to the denial by Corbett, but it could also have meant that the company wanted to record the resignation for record purposes only.
- [46] The fact of the advice is not conclusive, but shows that there was a consideration of Corbett leaving.
- [47] The next consideration is the letter of Corbett of 18 August 2008, stating:
'Acceptance of your letter dated 15 August 2008.'
- [48] This in itself does not take the matter any further and is not an acceptance of the contents of the letter. This however, was an opportunity to Corbett to question the company's contention that he had resigned, which he failed to do and for which failure he could not tender a plausible explanation.
- [49] The next consideration is his lack of recording any objection to the 'fabrication', or discussing the matter with anyone of the company. This favours the company's version that he had resigned. There was a clear opportunity to object to the contents of the letter which he received from the company recording a resignation. More so, because on the Friday after having received the letter of 15 August 2008, he had telephonically spoken to Van Wyngaardt, merely saying that he was going to take the matter further.
- [50] Van Wyngaardt's version that Corbett telephonically resigned and then on the Thursday changed his mind and said he would argue that he was off sick and would resume his duties on Monday 18 August 2008, finds support in the mere statement that the matter would be taken further instead of objecting to the "fabrication".

- [51] The call of 15 August 2008 was an opportunity to record Corbett's surprise at what was happening to him, but the opportunity passed without Corbett saying anything about it. The fact that Corbett only on 30 September 2008, when he referred the matter to the CCMA, replied to the letter of 15 August 2008 disputing the resignation, favours an interpretation that he probably resigned, changed his mind, and eventually decided to take the matter to the CCMA.
- [52] The fact that Corbett was prepared to sign the pension fund form recording his resignation clearly favours the company's version that he had resigned. In his own words, before he changed his position, recording a dismissal would not have affected his pension pay out.
- [53] The Commissioner also embarked upon a consideration of the effect of the termination clause. In the end he concluded that a proper interpretation of the termination clause requires a resignation in writing. Because it was not in writing the alleged resignation was void anyway and that weighed more heavily than all the other factors referred to above.
- [54] The Commissioner ultimately resolved the dispute about the interpretation of the contract of employment in favour of Corbett.
- [55] The Commissioner's provisional finding and the reasoning behind the provisional finding in paragraph 7.4 of the award that the events pointed towards a resignation cannot be faulted and is a finding that a reasonable Commissioner could have made.
- [56] The provisional finding is correct that the factors jointly pointed towards Corbett's resignation and would have resulted in a finding that Corbett resigned, either on the probabilities or on applying the onus.
- [57] The Commissioner however disregards all this evidence and all the probabilities informing his provisional finding, in favour of an award based solely on the interpretation of the termination clause of the contract of employment. He accepts the fact that the resignation had to be in writing to exclude and outweigh all the other factors. By excluding all the other evidence and probabilities he committed gross misconduct in the proceedings and clearly arrived at a wrong

conclusion.

- [58] The logical conclusion is that the Commissioner considered the events, facts and probabilities and concluded that the probabilities

favoured the version that Corbett resigned. But because of the termination clause an oral resignation, according to the Commissioner, would be invalid and for that reason all the probabilities are disregarded and the finding is made on the basis of his legal interpretation of the termination clause only.

- [59] The Commissioner is in any event incorrect on the legal conclusion as an oral resignation is not void. In this regard see the case of *Sihlali v S.A. Broadcasting Corporation Ltd*4 .

[60] The probabilities favour a resignation rather than the "fabricated" dismissal. It is not necessary in making a finding to rely on an onus. At best, however, for Corbett, he has not discharged the onus to establish a dismissal.

[61] Having read the record and considered the probabilities, this Court is in as good a position as the CCMA Commissioner to substitute its finding for that of the Commissioner. In addition this matter arose in 2008 and it is in the interest of justice to bring an end to it.

[62] The Commissioner had to determine whether the CCMA had jurisdiction to entertain the dispute. The dispute was whether the company

dismissed the employee or whether the employee resigned in which case the CCMA would not have jurisdiction. The correct test to apply in assessing the Arbitrator's award is to determine whether the Arbitrator correctly or incorrectly assessed the facts and arguments and arrived at a conclusion that a reasonable arbitrator could have arrived at. The Commissioner was clearly wrong in his finding that Corbett did not resign because the resignation was not in writing. No reasonable commissioner could have come to that conclusion.

[63] As far as cost is concerned, the law dictates that cost should follow the result and there is nothing in fairness to come to a different conclusion. The following order is made:

63.1 The arbitration award under case number LP5798/2008 dated 16 June 2010 is reviewed and set aside.

63.2 The following award is substituted for the award in the arbitration:

'The application is dismissed as the applicant has resigned.'

63.3 The third respondent is to pay the applicant's costs.

Coetzee AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

FOR THE APPLICANT: Advocate Riaan Grundling.

Instructed by: Joubert and May

FOR THE RESPONDENTS: No appearance

1Page 56 of the record

2Record page 50 and 60

3Record p 71 line 1-4

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