

SOUTH AFRICA / JUDGMENT

Annandale v FEMCO Technology Holdings Ltd (JA 10/06) [2009]

ZALAC 28 (13 August 2009)

[2009] ZALAC 28

COURT

Labour Appeal Court

BEFORE

Zondo JP, Patel JA, A. Kruger AJA

CASE / FILE NUMBER

JA 10/06

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IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

Held in Johannesburg

Case no: JA 10/06

In the matter between

W.C. Annandale Appellant

And

FEMCO Technology Holdings Limited Respondent

JUDGMENT

ZONDO JP

Introduction

- [1] This is an appeal against a judgment and order of the Labour Court given by Maya AJ in terms of which she dismissed the appellant's claims for damages, leave pay and the so-called 13th cheque with costs. Subsequent to the dismissal of his claims, the appellant applied to the Labour Court for leave to appeal to this Court. That application was dismissed. The appellant then petitioned the Judge President of this Court in terms of the Rules of this Court for leave to appeal. Leave to appeal was then granted by this Court.

The factual background.

[2] Extensive evidence was led by the appellant before the Labour Court. The appellant called Mr Van Zyl who had previously been the Chief Executive Officer of the respondent. The appellant also gave evidence on his own behalf. The respondent called Mr Kumar,

a director of the respondent, and a Mr Turner. In my view much of the evidence given by the appellant was irrelevant if regard is had to what the issues were before that Court. The claim which the appellant instituted in the Labour Court was one for the payment of damages, a 13th cheque or bonus and leave pay plus costs. His cause of action in respect of the damages claim was that the respondent had committed a material breach or a repudiation of a verbal contract of employment which existed between himself and the respondent and he had accepted the material breach or repudiation and had resigned from the respondent's employment whereafter he sued the respondent

for the damages he allegedly suffered as a result thereof plus a bonus and leave pay.

[3] The appellant alleged, and the respondent initially denied but later admitted, that the contract of employment had been a verbal one and had been for a fixed period of three years. It is common cause that the contract of employment commenced on 1 August 1997. Accordingly, if it had run its course, it would have expired on the 31st July 2000. The position in which the appellant was employed by the respondent was that of a joint managing director of the respondent. Before he was appointed to that position, the appellant had been a director of the respondent, albeit a non-executive one. The other joint managing director was one Mr Zammit. Mr Zammit had already passed away at the time of the trial. When the appellant and Mr Zammit were appointed as joint managing directors of the respondent, Mr Zammit was assigned Femco Mining (Pty)Ltd, a subsidiary of the respondent, to manage and the appellant was assigned Auto Cable Industries (Pty)Ltd, ("ACI"), also a subsidiary of the respondent, to manage. The appellant was designated the executive chairman of ACI.

[4] On the 21st April 1999 Mr Kummar, who was the third of the directors of the respondent, the two others being the appellant and Mr Zammit, addressed a letter to the appellant in which he stated that the Board of Directors of the respondent had decided to suspend the appellant with immediate effect on full pay and benefits pending a certain investigation. Mr Zammit was also suspended. The letter read thus:

"Dear Mr Annandale

YOUR EMPLOYMENT AS AN EXECUTIVE OF OUR GROUP OF COMPANIES

I have been instructed by the Board to inform you, as I hereby do, that in accordance with a Resolution of the Board of even date your services as an executive employee of the Company and your duties as an executive of any of the Companies subsidiaries be and are hereby suspended with immediate effect on full pay and benefits pending an investigation into certain prima facie irregularities concerning your employment with the Company and its subsidiaries.

During the period of your suspension you will not be required to work or perform any executive duties and accordingly we require you to refrain from communicating with any of the Company's customers, suppliers, employees or any other business associate. You will, however, be required to hold yourself available to attend meetings at the request of a Board member of this Company subject

only to reasonable notice being given to you. I anticipate that the investigations will be concluded during the second half of May 1999 whereafter your employment will either be immediately reinstated or, alternatively, you will receive notice of a disciplinary enquiry to be convened."

Before us Counsel for the appellant indicated that he was not relying on the absence of a valid resolution of the Board of Directors to challenge the validity of the suspension. Therefore, nothing more needs to be said about whether there was a valid resolution of the Board.

- [5] It is clear from the above letter of suspension that the suspension related to the appellant's employment as an executive and did not affect his directorship in the respondent. This, therefore, means that during the suspension he was going to be in the same position in which he had been before when he was a non-executive director of the respondent.
- [6] The appellant testified that, notwithstanding the letter of suspension of his services as an executive employee, Mr Kumar continued to ask him to perform various tasks over a number of weeks. It seems that this went on until around the 27th May or so. The appellant testified that he performed those tasks.
- [7] The appellant testified that, at the time of his suspension he was not given the reasons for his suspension. I do not see why the respondent should have been required at that stage to say more than it said in the suspension letter. In that letter the respondent said that there appeared to be certain "prima facie irregularities" relating to the appellant's work and it was going to investigate them. The appellant subsequently wrote a letter to the respondent in which he requested reasons for his suspension. It is common cause that he did not receive any reply to that letter. Mr Kumar testified that at the time of the appellant's suspension he did give the appellant the reasons for his suspension. The Labour Court found in favour of the respondent in this regard.
- [8] On the 3rd May 1999 – that is just under two weeks after the appellant's suspension – Mr Kumar sent a memorandum to the appellant in which he asked the latter to provide certain information, correspondence and other documents relating to various companies within the respondent's group of companies and others in which the appellant was involved either as a person or as chairman of ACI or as a joint managing director of the respondent. Mr Kumar ended that memorandum with a statement to the effect that the information was required "on an urgent basis."
- [9] On the 4th May 1999 the appellant sent Mr Kumar a memorandum in which he purported to provide the information, correspondence and documents requested by Mr Kumar in the memorandum of the 3rd May. On the 6th May 1999 Mr Kumar sent the appellant another

memorandum asking the latter to provide him with further and additional information. The further information and documentation sought by Mr Kumar in the second memorandum were even much more extensive than the information he had requested in the first memorandum.

- [10] On the 10th May 1999 the appellant addressed a letter to Mr Kumar in which he responded to Mr Kumar's memorandum of the 6th May. The appellant's letter comprised four and a half pages of information. I have decided not to quote these memoranda exchanged between the two men.
- [11] The appellant testified that about the 27th May 1999 he went to Port Elizabeth and, while he was there, he was shown an organogram of the respondent which excluded him. As a result of seeing that organogram, he consulted an advocate whom he knew and he and the advocate drafted a letter of his resignation. The letter of resignation was dated the 28th May 1999 and was addressed to "The Board of Directors, FEMCO TECHNOLOGY HOLDINGS and all SUBSIDIARIES". The heading of the letter read: RESIGNATION AS DIRECTOR AND TERMINATION OF EMPLOYMENT."

13.1 In the first paragraph of the letter the appellant wrote:

"I hereby wish to record that the restructuring of the management which eliminated me as an executive board member constituted an unfair dismissal in terms of the Labour Relations Act. In addition it constitutes a repudiation of my service contract, which is hereby accepted."

In the second paragraph of the letter the appellant wrote that "in so far as it may impinge on my offices as director, I resign as a director with immediate effect of" a list of companies which he set out including the respondent and ACI. He accused the Board of Directors of having "made my continued relationship with the companies intolerable."

- [12] After the second paragraph the appellant placed on record a number of things which he said had "contributed to this situation." These included that:
- (a) since his suspension he had not been provided "with any reason whatsoever as to why" he had been suspended; he alleged that this "constituted an unfair labour practice"; he further alleged that he had "co-operated to the best of my ability with the investigation initiated by Mr Kumar" and complained that "(t)he innuendo created by this action is harmful and damages my reputation as a businessman". It is not clear whether by "this action" he was referring to the respondent's alleged failure to give him "any reason whatsoever" for his suspension or the fact that the suspension had gone on for four weeks or both.
 - (b) the respondent seemed to have "pre-judged" him and did not include him as "part of the company's future"; he alleged that this constituted an unfair dismissal.

(c) he and Mr Zammit had been suspended and subsequently Mr Zammit's suspension had been withdrawn; he pointed out that "a scapegoat for the non-performance of the major shareholders and the consequential loss suffered by the company is being sought in my person"; he also wrote: "I am no longer prepared to continue under these circumstances."

(d) he pointed out in effect that he had provided the information which had been asked of him by Mr Kumar and yet he remained suspended; he reserved "all rights to claim whatever damages" he might have suffered "as a result of the major shareholders' breach of their agreement which breach necessitated the termination of my employment."

[13] On the 1st June 1999 the respondent replied to the appellant's letter of resignation. After referring to the appellant's letter of resignation of the 28th May 1999, Mr Kumar, who wrote the respondent's letter, wrote that the appellant had been suspended on full pay and benefits

pending the completion of the respondent's investigation "into the affairs of the company while under your leadership." He pointed out that the "investigations" had not yet been completed and had taken longer than had been expected which, he said, was due in no small part to the appellant's failure to be "completely open with us." Mr Kumar also pointed out that "(a)n interim management structure has been put in place pending the completion of the investigations as is required by good company governance". Mr Kumar also wrote: "We note your resignation as director of the companies listed in your fax, and construe your fax to be your resignation as an employee of Femco Technology Limited, which resignation has been accepted by us."

[14] In the letter of the 1st June 1999 Mr Kumar denied the appellant's allegation contained in the latter's letter of resignation that the respondent had committed an unfair labour practice or that it had repudiated the service contract between itself and the appellant. Mr Kumar also denied the allegation that the respondent had not furnished the appellant with reasons for his suspension. He also pointed out that reasons for the appellant's suspension appeared clearly from the two requests for information dated 3 and 6 May 1999 which had been given to the appellant. He also pointed out that KPMG, a firm of auditors, had been involved in the investigation and they were "not satisfied with the completeness of the information furnished by you." Mr Kumar denied that the appellant would have had no part in the future of the respondent if he was cleared of charges which were being investigated against him. He pointed out that the appellant could obviously not have been part of the interim management structure during his suspension. Mr Kumar also reminded the appellant that Mr Zammit, who had been suspended together with the appellant, had been reinstated because the investigations "into his possible misconduct had resulted in him being exonerated." Mr Kumar denied the allegation that the respondent was looking for a scapegoat. He stated that from the evidence at the disposal of the respondent it appeared that the appellant had breached his fiduciary duties both as an employee and as a director and "your resignation appears to be an attempt by you to frustrate our investigations. It is facetious for you to allege that Mr Kumar had indicated to you that he was satisfied with your responses to the issues raised in the list presented to you on 3 and 6 May 1999."

[15] The appellant did not reply to the respondent's letter of the 1st June 1999 until the 23rd July 1999. On that day the appellant addressed a letter to the Board of Directors of the respondent. In the letter the appellant rejected the statement by the respondent that he had not been completely open with it in providing the information that had been requested from him. He went on to say: "It is correct that I resigned as a director of the companies listed in my notice dated 28th May 1999. It is, however, incorrect to assume that I resigned as an employee from Femco Technology Holdings Limited." In the following paragraph the appellant wrote:

"You will note from the first paragraph of my letter dated 28th May, 1999, that I stated that your conduct constitutes a repudiation of my service contract. I reserve my rights to claim any damages whatsoever that I may have suffered as a result of your repudiation. I reiterate that your conduct constitutes an unfair labour practice and unfair dismissal in that I have to date, not been advised of what allegations are made against me and why I was suspended."

Later in the letter the appellant stated:

"I note that you allege in paragraph 2 on page 2 of your letter that although I was not part of the restructure, that in the event of my being cleared of charges of misconduct I would well fit into the future plans. Meanwhile my suspension continues – way beyond your indicated middle of May 1999. The Labour Relations Act is clear on the matter of suspension and the period of my suspension is unreasonable."

In the next paragraph the appellant stated that he had not as yet been charged with misconduct at that stage and that the allegations of misconduct contained in the respondent's letter of the 1st June 1999 were defamatory. He denied having breached his fiduciary duties. Towards the end of the letter the appellant demanded reinstatement and payment of arrear salary for June and July 1999 within 24 hours and threatened that, if this was not done, he would be left with no option but to refer his case to the Commission for Conciliation, Mediation and Arbitration ("CCMA"). He then stated that he had 30 days leave due to him and advised that "I will be taking nine working days leave from 27th July 1999 to 6th August 1999 both days inclusive."

[16] On the 23rd August 1999 the appellant's attorneys wrote a letter to the respondent in which they inter alia said that a period of four months had lapsed since the appellant's suspension and that the appellant had not been paid his salary for June and July which they said was unacceptable. They asked the respondent to indicate its intentions about the appellant. On the 2nd September the appellant referred a dispute in connection with his suspension to the CCMA and indicated in the referral form that the result he sought was reinstatement in his previous position.

Proceedings in the Labour Court.

[17] While it is not immediately clear what happened to the appellant's referral of a dispute relating to the suspension to the CCMA for conciliation, what is clear is that the respondent did not accede to any of the appellant's demands and maintained that the appellant had by

his letter dated 28 May 1999 resigned both as a director and as an executive employee. It is also clear that at some stage the appellant instituted action in the Labour Court which led to this appeal. The action was not instituted on the basis of an unfair labour practice or unfair dismissal. The appellant's action was instituted in terms of sec 77(3) of the Basic Conditions of Employment Act, 1998 which confers on the Labour Court the same jurisdiction that the High Court has in matters concerning contracts of employment.

[18] As stated earlier, the appellant's claims in the Labour Court were for the payment of damages by way of his salary for the balance of his contract of employment period from June 1999 to 31 July 2000 which was a period of 13 months at a salary of R55

000,00 per month, leave pay for 27 days and a 13th cheque. His cause of action was set out in paragraphs 7, 8, 9, 10 and 11 of his statement of case while paragraphs 12 and 13 dealt with the damages he alleged to have suffered as a result of the alleged material breach or repudiation by the respondent of his contract of employment. Paragraphs 7-13 of the appellant's statement of case read thus.

"7. On 21 April 1999 the [appellant] was advised by the Respondent's Mr N. Kumar that he was suspended on full pay and benefits pending an investigation into certain irregularities concerning his employment. The aforementioned suspension was unlawful as there existed no legally valid grounds or reasons therefore (sic).

Notwithstanding that the [appellant] requested same, the [appellant] was at no stage advised of the reasons for, or any

facts

whatsoever as to why his employment was suspended.

On or about 28 May 1999 the [appellant] received an organogram containing the so-called new structure of Respondent's management. Said organogram reflected that the [appellant] was no longer an employee or director of the Respondent.

The abovementioned conduct of the Respondent as set out in paragraphs 7, 8 and 9 constituted a material breach, alternatively, repudiation of the [appellant's] contract of employment.

The [appellant] therefore on or about 28 May 1999 elected to accept said material breach, alternatively, repudiation of his contract of employment and [appellant] consequently therefore cancelled same. A copy of a letter from the [appellant] addressed to the Respondent notifying the Respondent of the aforementioned is attached hereto as annexure "A".

The [appellant] has suffered damages due to the unlawful repudiation, alternatively, material breach of his contract of employment.

Said damages being the salary the [appellant] would have earned for the unexpired period of his contract of employment."

In par 15 the appellant alleged that his damages amounted to R 710 000,00.

[19] With regard to the appellant's claim for the 13th cheque or bonus, the appellant made only one allegation in his statement of case. That was in para 16. It read thus:

"The [appellant] was also not paid his thirteenth cheque or bonus. Same which is equal to one (1) month salary."

With regard to the appellant's claim for leave pay, the only allegation that the appellant made in his statement of case was contained in para 20. Para 20 read thus:

*"The [appellant] has also not been paid his outstanding leave pay. Same is calculated as follows:
Twenty Seven*

(27) days leave outstanding equals R62 000, 00."

Judgment of the Labour Court

[20] The Labour Court dismissed the appellant's claims with costs. It dealt with the evidence adduced before it extensively. It found the appellant to have been an "unsatisfactory witness" and his evidence as "not always having been truthful" (para 34 of the judgment of the Court below). The Judge below gave a number of examples taken from the appellant's evidence to support this conclusion. She found that Mr Kumar informed the appellant of the reasons for his suspension. In other words she rejected the appellant's version that he was not told the reasons for his suspension. Maya AJ found that the information that Mr Turner conveyed to Mr Kumar about "prima facie irregularities, constituted a sufficient basis for an investigation even if Mr Kumar was not yet aware of 'the false representation relating to Cacacae shareholding in EHS, the issue of payments made to non-existent Genfemanco and the other disquieting aspects of the [appellant's] conduct in the running of ACI's affairs highlighted in paragraphs 18 and 19 above."

Maya AJ found that an investigation was clearly warranted. Maya AJ did not expressly make a finding whether or not the suspension was justified but it seems to be clearly implied in her judgment that the suspension was justified.

[21] With regard to the appellant's contention that the respondent's conduct constituted a repudiation or breach of the contract of employment which entitled him to cancel the contract of employment, the Labour Court found that the respondent's

conduct did not constitute a breach or repudiation and that, therefore, the appellant was not entitled to cancel the contract of

employment. As to the claim for a bonus, the Court below found that such claim was “beset by a fundamental flaw – it was not alleged in the pleadings that it was a term of the employment contract that a 13th cheque was payable ...”. The Court a quo also said that it was not aware whether this bonus was a performance-related bonus or a service-related bonus “which an employee receives for completing a 12 month cycle of employment.” The Court below found that no case had been made out by the appellant for an order for the payment of such bonus.

[22] On the claim for leave pay the Court below also found that such claim, like the claim for a bonus, “similarly lacked foundation in the statement of claim that it was a term of the employment contract”. The Judge below also had regard to the provisions of the repealed Basic Conditions of Employment Act, 1983 which was in operation at the time of the conclusion of the contract of employment to determine whether the provisions of that Act could help the appellant in his claim for leave pay. She found that even invoking the provisions of that Act could not help the appellant.

The appeal

[23] In dealing with this matter it needs to be borne in mind that this case turns on the ordinary principles of the law of contract. The appellant’s case is that he had a verbal contract of employment with the respondent and the respondent committed a material breach or a repudiation of that contract. He contends that this entitled him to cancel the contract of employment which he did by his letter of the 28th May 1999. He further says that, as his contract of employment was a three year fixed term contract and there were still 13 months left, he was entitled to damages in the form of the salary for those thirteen months. He also claimed payment of leave pay and the so-called 13th cheque or bonus.

[24] In terms of the appellant’s statement of case the acts or omissions on the respondent’s part which the appellant alleged constituted a material breach or repudiation of the employment contract were:

- (a) his suspension by the respondent (allegedly) without valid grounds.
- (b) the alleged failure by the respondent to give reasons for his suspension.
- (c) his alleged exclusion from an organogram alleged to reflect the management structure of the respondent.

[25] Before us Counsel for the appellant conceded that the appellant’s suspension and the respondent’s failure, as alleged, to give the appellant the reasons for his suspension alone were not on their own sufficiently serious to constitute a repudiation or material breach of the contract of employment which the appellant could accept and, thereby, bring about an end to the contract. He submitted that the suspension, the alleged failure to give reasons and the alleged exclusion of the appellant from the organogram reflecting, as he alleged, the management structure of the respondent cumulatively constituted a repudiation which the appellant

was entitled to accept and, thereby, bring an end to the contract of employment. In par 3.3 of his heads of argument Counsel for the appellant submitted that “the cumulative effect of the three actions of the respondent referred to [above] meet the requirements for repudiation or material breach as formulated in Fijen in that it constituted conduct of the respondent which was calculated or likely to destroy or seriously damage the relationship of confidence and trust between appellant and respondent, without reasonable or probable cause”.

[26] Counsel for the appellant relied heavily on Council for Scientific and Industrial Research v Fijen 1996(2)SA 1(A), particularly at 9C-J. In that case the Court found that there was no repudiation in the narrow sense set out by the now defunct Labour Appeal Court and the Industrial Court. The reference to repudiation in the narrow sense was a reference to conduct that reveals that the party concerned no longer wishes to continue to be bound by the contract. Reference to repudiation in the wide sense was a reference to conduct that constitutes a material breach of the contract of employment which entitles the innocent party to cancel the contract.

[27] Counsel for the appellant submitted that the test for the determination of whether or not the respondent’s conduct constituted a material breach or a repudiation in the wide sense is as set out in the Fijen case at 9 F-H. There it was said:

“Mr Pretorius, on behalf of the appellant, relied on an English rule of law. It is that in every contract of employment there is an implied term that the employer will not, without reasonable and probable cause, conduct itself in a manner calculated or likely to destroy or seriously damage to relationship of confidence and trust between the parties. This just implied term may be breached without the intention to repudiate a contract. It is sufficient if the effect of the employer’s conduct as a whole, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it. See Halsbury’s Laws of England 4th ed (reissue) para 44 and the cases there cited. He submitted that a reciprocal duty rests on the employee although he was not able to quote any English authority to that effect. These principles, he said, apply in our law.

It is well established that the relationship between employer and employee is in essence one of trust and confidence and that, at common law, conduct clearly inconsistent therewith entitles the ‘innocent’ party to cancel the agreement (Angehrn and Piel v Federal Gold Storage Co Ltd 1908 TS761 at 777-8).

From the above it is clear that the test to be employed in this regard is whether or not:-

“...the effect of the employer’s conduct as a whole, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.” (p.9 of the Fijen judgment.)

At 9 H-I of the Fijen judgment the Court pointed out that it was established that the relationship of employer-employee is in essence one of trust and confidence and that at common law “conduct clearly inconsistent therewith entitles the innocent party to cancel the agreement.”

[28] In dealing with this matter it is necessary to start at the beginning. The beginning is what the terms and conditions of the verbal contract of employment between the parties were with regard to the suspension and the giving of the reasons therefor. The questions to be asked are whether it was a term or condition of the contract of employment that the respondent could not suspend the appellant with or without valid reasons and whether or not it was a term or condition of the contract of employment that, if

the respondent suspended the appellant, it was to furnish him with reasons or valid reasons therefor.

[29] In his evidence the appellant testified that the issue of suspension was not discussed. Mr Van Zyl was asked whether “the question of the right to suspend any of the managing directors... [was] raised between [the appellant and Mr Zammit] at all.” Mr Van Zyl then answered thus:

“My Lady the question of suspension as a mechanism to taking them out of control was never raised. What was agreed as the result of whatever mechanism existed, that they would not be taken out of control. The question of suspension was never raised.” (Underlining supplied).

In any event in the statement of case the appellant did not include an allegation to the effect that one of the terms or conditions of his contract of employment was that he would not be suspended under any circumstances or that he would not be suspended without valid reasons.

[30] In the pre-trial minute which was agreed upon between both parties it was stated in par 9 thereof that the appellant had the duty to begin and bore the onus to prove the terms and conditions of the contract of employment on which he was relying as well as the damages. To a pre-trial question asked by the respondent as to what the terms and conditions were of the contract of employment upon which the appellant relied for his claims, the appellant’s replied was that “the terms were as are set out in paragraphs 4, 5 and 6 of the [appellant’s] statement of case. As well as those implied by law into a contract of employment. Furthermore, it contained the duties or essentialia as underlies the contract of employment – the naturalia contractus.” Earlier on I quoted paragraphs 7, 8 and 9 of the appellant’s statement of case and do not propose to do so again.

[31] In response to a pre-trial request from the respondent that the appellant specify what the terms or conditions of the verbal contract of employment were which the appellant alleged had been breached by the respondent, the appellant responded that the terms that had been breached were these:

“The employee’s duty not to without reasonable or probable cause conduct itself so as to destroy or seriously damage the relationship of trust and confidence between the parties was breached by the Respondent. The conduct which manifested the above was the Respondent suspending the [Applicant] unlawfully and without reasonable or probable cause.”

In another paragraph of the same document the appellant alleged that the respondent's conduct which fell within the ambit of conduct intended or meant to destroy or seriously damage the relationship of trust and confidence between the parties was in

effect the preparation of "the organogram mentioned in paragraph 9 of the applicant's statement of case [in terms of which] there was no position for the [appellant] with the respondent anymore alternatively that the Respondent was determined or intended not to have the [appellant] reinstated fully or at all".

- [32] Since the appellant stated in its replies to the respondent's pre-trial questions that the term of the verbal contract of employment which the respondent breached was in effect that it conducted itself "so as to destroy or seriously damage the relationship of trust and confidence between parties", the fundamental finding that the appellant must secure if it is to succeed is a finding that the respondent conducted itself towards him in such a way "as to destroy or seriously damage the relationship of trust and confidence between the parties." If such a finding cannot be made or is not justified on the evidence, the appellant cannot succeed. That is on the assumption that such a term of the contract of employment was proved.
- [33] It must be recalled that the respondent's conduct which the appellant is driven to contend was such "as to destroy or seriously damage the relationship of trust and confidence between the parties" was the fact that it suspended him pending an investigation into what it referred to as "prima facie irregularities", the alleged failure to furnish reasons for such suspension and his alleged exclusion from the respondent's management structure as allegedly evidenced by a certain organogram that he alleged reflected the respondent's management structure.
- [34] On the evidence that was adduced before the Court below it is clear that the respondent suspected certain irregularities connected with the two joint-managing directors, namely, the appellant and Mr Zammit and sought to investigate such "prima facie irregularities". When the appellant was cross-examined in the Court below, there were a number of aspects of his evidence which either showed him to be dishonest or which left one with serious suspicions about inter alia his loyalty to the respondent. The respondent's conduct in suspending the appellant in the circumstances of this case could not conceivably be said to have been conduct "intended to or likely to destroy or seriously damage the relationship of confidence and trust between the parties". What kind of employee or executive was the appellant that he could think that the respondent should not have suspended him in order to properly investigate what it considered to be "prima facie irregularities?" At the time that the appellant cancelled the contract, Mr Zammit, who had also been suspended at the same time as the appellant, had been found not to have done anything wrong and his suspension had been withdrawn and he was back in his position at work. From this the appellant could and should have inferred that, if the investigation revealed that he was not guilty of anything, his suspension, too, would be withdrawn and he, too, would be back in his position at work. A reasonable employee in the appellant's position would have reasoned

along these lines. Furthermore, the appellant's suspension was on full pay and benefits. That is also an important factor to be taken into account in determining whether or not the appellant's suspension was conduct "intended to or likely to destroy or seriously damage the employment relationship of confidence and trust between the parties".

- [35] With regard to the organogram relied upon by the appellant, the appellant conceded under cross-examination that the organogram did not reflect the management structure of the respondent, his employer, but the management structure of ACI. He also conceded even that the management structure of ACI as reflected in that organogram was an interim structure created during the time of his suspension. ACI is the company in which the appellant was "posted" as executive chairman. He remained a joint managing director of the respondent. Even if the organogram related to the respondent, if it was for an interim period during which the appellant was absent on suspension, that was acceptable. How could it conceivably be said that a company that puts in place an interim management structure during a time when there is a senior manager or executive who is away be said to be conducting itself in a manner calculated to or likely to destroy or seriously damage its employment relationship of with confidence and trust such senior manager or executive? That can simply not be said.
- [36] Part of the conduct that the appellant relied upon to contend that there was a material breach or repudiation of the contract of employment was that the respondent failed to provide reasons for his suspension. The Court below found that the respondent did give the appellant reasons for his suspension. In the letter of suspension the respondent informed the appellant in effect that there appeared to be certain irregularities and it would investigate them but, pending such investigation, he was suspended. I do not think that at that stage, when the respondent was still to investigate properly the nature and extent of such "prima facie irregularities", it needed to say anything more. At any rate the appellant did not allege, let alone prove, that one of the terms of the contract of employment existing between the parties prior to 28 May 1999 was that the respondent had an obligation to furnish him with reasons if he was suspended. Certainly there is no such duty on the employer at common law. Care must be taken not to bring into this matter considerations that would have been applicable if the appellant had challenged the fairness of his suspension as an unfair labour practice under the Labour Relations Act, 1995 because the appellant elected not to follow the LRA route and chose to base his claims on the law of contract. There are consequences for the exercise of an election and the appellant cannot eat his cake and have it. Even if there was an obligation on the part of the respondent to give reasons for the appellant's suspension, the failure to give such reasons, if there was such failure on the respondent's part, could not be described as conduct "calculated to or likely to, destroy or seriously damage the relationship of confidence and trust between the parties."

[37] The result of the above is that all the three acts or omissions upon which the appellant relied to show conduct on the part of the respondent that was said to be calculated to, or, likely to destroy or seriously damage the relationship of confidence and

trust between the parties can simply not be described as conduct calculated to or likely to destroy or seriously damage the relationship of confidence and trust between the parties.

[38] Even if one used the test of whether the respondent's conduct relied upon by the appellant was conduct with which, judged reasonably and sensibly, an employee in the appellant's position could be expected to put up, I have no hesitation in concluding that it is not conduct that an employee could not reasonably be expected to put up with. That question must be determined on the basis of a reasonable employee in the appellant's position. In my view a reasonable employee in the appellant's position would appreciate the need for the respondent to launch an investigation if there appeared to be certain irregularities connected with the appellant's work. Such reasonable employee would also know that it is a usual practice with employers generally that an employee is suspended on full pay if what appears to be irregularities connected with his work is investigated. A reasonable employee in the appellant's position would also bear in mind that, if the investigation suggested that he was innocent, the suspension would be lifted because that is what was done with Mr Zammit, his co-managing director. Furthermore, a reasonable employee would also have made proper inquiries about the organogram before making a decision as important as resigning from his job. If the appellant had made such inquiries, he would have been informed that the organogram related to ACI and not the respondent and that it was an interim one that was to apply while he was on suspension. With this information, a reasonable employee would not

have resigned.

[39] After the appellant had resigned, he turned around and demanded reinstatement. He said that his letter of the 28th May 1999 was only a resignation as a director and not as an employee. This was one of those occasions when the appellant lied. He continued with this story even when he was giving evidence under oath. Of course he was simply being patently dishonest in this regard because not only is his letter of the 28th May 1999 clear that he resigned both as a director and as an employee but also his statement of claim is to the effect that he cancelled the verbal contract of employment by his letter of the 28th May 1999.

[40] The importance of the fact that, after his letter of the 28th May 1999, the appellant sought reinstatement lies in the irreconcilability of his desire for reinstatement with the statement he made in his letter of the 28th May that he found a continued employment relationship with the respondent intolerable and he could not put up with it. One is driven to the conclusion that the conduct that the appellant now complains of on the respondent's part was not intolerable to him because, if it was intolerable as he suggested in his letter, he would not have sought reinstatement within two months thereafter unless something had happened in the meantime which made the suspension, the alleged failure to give reasons

and the organogram tolerable. When the appellant was asked under cross-examination what had changed since the 28th May 1999 which made a continued relationship with the respondent no longer intolerable, the explanation he gave related to other issues upon which he did not rely in this case as having constituted a material breach or a repudiation of the contract of employment. He did not say that the respondent had withdrawn the suspension nor did he say that the respondent had provided reasons for his suspension nor did he say that the appellant had tendered an apology which made him understand that there was nothing wrong with

the suspension nor did he say that the organogram relating to ACI had been amended to include his name. One would have expected him to give evidence along these lines to show that an intolerable situation had become tolerable because the conduct he was supposed to have found impossible to put up with was the suspension, the respondent's alleged failure to give reasons for the suspension and his (temporary) exclusion from ACI's interim management structure. In my view the appellant's failure to give an explanation along these lines for his about face change on his attitude to a continued employment relationship with the respondent is indicative of the fact that he had never found the conduct complained of and relied upon in these proceedings as so intolerable that he could not put up with a continued employment relationship with the respondent.

[41] Another factor which supports the conclusion that the appellant had never found a continued employment relationship with the respondent intolerable is that, by his own admission during his evidence, for the best part of his suspension period before 28 May the appellant found it possible to work with Mr Kumar for whom he performed various tasks. The appellant was suspended on the 21st April 1999 and he resigned on the 28th May. This means that for about five weeks he performed various tasks in the company at the request of the appellant. The only thing that occurred around the 28th May that could have been the last straw was the organogram. He misread the organogram. Had he read it correctly, it could not have made a continued employment relationship intolerable.

[42] In the above circumstances I conclude that the appellant failed to prove that the respondent's actions that he complained of made continued employment relationship between the parties intolerable. The appellant's failure to show this went to the crux of his claim for damages based on an alleged material breach or repudiation of the contract of employment. Such failure was

fatal to the appellant's claim for damages relating to his salary for the 13 months or so period of his contract that he did not work.

Did the respondent have the right at common law to suspend the appellant on full pay and benefits?

[43] I have above referred to the fact that the evidence given by both the appellant and his witness, Mr Van Zyl, was that, when the terms and conditions of employment of the appellant as the respondent's joint managing director were discussed, there was no

discussion at all on whether or not the respondent could suspend the appellant. That means that it cannot be said that it was a term or condition of the appellant's employment that he could not be suspended or could not be suspended except under certain circumstances in terms of those terms and conditions agreed upon between the parties. Of course, that makes it necessary to consider whether or not at common law the respondent as employer had a right to suspend the appellant on full pay and benefits. That really depends upon what the common law position is on the suspension of employees.

- [44] I see that the Court below accepted a submission made by Counsel for the appellant in that Court that at common law an employer has no right to suspend an employee unless such right is provided for in the contract of employment. In support of this statement the Court below relied upon Norton v Mosenthal & co 1920 EDL 155 and Joubert, LAWSA vol 13 part 1 para 155. I have read the case of Norton v Mosenthal & Co 1920 EDL 155. It is no authority for the proposition for which the Judge a quo cited it. I also note that the learned Judge did not refer to any specific page or passage in the judgment. In LAWSA Vol 13 Part 1 par 155 the following appears:

"The suspension of an employee as a result of disciplinary action in certain circumstances will absolve the employer from the obligation to pay wages or salary to the employee for the period of the suspension. This is only the case if the contract of employment permits such action and serious misconduct is involved. Even though there may be no provision governing this matter in the contract of employment, the employer is entitled to suspend the employee without payment of salary if the employee is guilty of alleged negligent conduct causing damage to property, fraud or theft and his misconduct results in financial losses to his employer which are disproportionately greater than his salary."

As can be seen what this passage refers to is the suspension of an employee as a sanction for misconduct. It does not refer to a suspension pending a disciplinary inquiry. It seems to me that, indeed, the Judge a quo misconstrued the passage in LAWSA vol 13 Part 1 par 155. Before I proceed, the question which needs to be considered is what a suspension means. In the context of a contract of employment the suspension of an employee is a suspension of such employee from his duties. That means that the employer prevents the employee from performing his contractual duties as an employee.

- [45] Whether or not an employer has a right to suspend an employee in terms of our common law depends upon the answer to another question. That question is whether or not the employee has a right to work or put differently, whether or not the employer is obliged to provide the employee with work. If the employee has a right to work, the employer has no right to suspend him even on full pay and benefits. If, however, the employee has no right to work, the employer has a right to suspend him on full pay and benefits.

[46] The general rule of our common law is that an employee has no right to work or an employer has no duty to provide the employee with work but is obliged to pay the employee his wages if the employee has tendered his services or if it is the employer who has prevented the employee from rendering his services. In other words, provided the employer accepts liability to pay the employee

his wages during the suspension, the employer has a right to suspend his employee. In “LAW of Master and Servant in South Africa”, Butterworths, 1956, Scoble writes at 171:

“Generally speaking a master commits no breach of the contract in refusing to give his servant any work to perform so long as he pays the wages agreed upon (Turner v Sawdon, 1901 (2) K.B 653)”

[47] There are exceptions to this general rule. One exception is where the employee needs to actually do the work in order to earn part of his income, for example, if he is paid by way of a commission. At 171-172 Scoble writes:

“The position is otherwise however where the servant’s remuneration depends on work being regularly carried out in the ordinary course of business, e.g. where the servant is engaged on a salary plus commission on all purchases and sales and half the profits of the goods sold, in which case the action of his master amounts to a dismissal entitling the servant to an action for damages.”

[48] In his article titled: “The Contractual Right to work” published in 1982 ILJ 247 MSM Brassey discussed the right to work and referred at 248 to what Bristowe J said in Faberlan.

McKay and Fraser 1920 WLJ 23 at 26:

“There Bristowe J, said:

Prime facie a man who is employed at a wage is only entitled to his wages. The employer is not obliged to provide him with work and the employee has no complaint if he is given no work to do.”

Brassey also referred at 249 to Turner v Sawdon [1901] 2 KB 653 (CA) where Asquith J is reported to have said:

“[I]t is true that a contract of employment does not necessarily, or perhaps normally, oblige the master to provide the servant with work. Provided I pay my cook her wages regularly, she cannot complain if I choose to take any or all of my meals out.”

[49] In Reikert’s Basic Employment Law by John Grogan (2nd ed) it is implied that at common law an employer has a right to suspend an employee provided the suspension is with pay. (see p. 97). In Labour and Employment Law, Wallis also makes the point expressly at para 16 (3-10) where he writes: “our law does not at present recognise a general obligation on the part of the employer to provide work for his employees”. In support of this proposition he refers to Faberlan v McKay and Fraser 1920 WLD 23 which he says approved Turner v Sawdon 1901 2 KB 653 at 657.

[50] Wallis also makes the point that, notwithstanding the above general rule, there are cases where the employer has an obligation to provide work to the employee. He refers to the following exceptions:

where the level of an employee's remuneration depends upon work being provided.

where the provision of work is necessary to maintain the employee's skills or reputation in a particular field of employment.

where a refusal to permit the employee to perform the work involves degradation in status.

Wallis concludes the discussion with the following paragraph at 16 (3-10):

"Where there is no obligation to provide work there is no reason why the employer should not suspend the employee from duty, for example, pending a disciplinary inquiry. The situation will be different where there is an obligation to provide work. A suspension without pay as a disciplinary measure is not permissible as the employer's obligation to pay remuneration during a period of suspension is clear."

[51] In: "The New Labour Relations Act: the Law after the 1988 Amendments" Cameron, Cheadle and Thompson deal with suspensions at 157. There these authors inter alia say:

"At common law [the suspension of an employee where he is charged with theft and the suspension is effected pending the outcome of a criminal case] may be unilaterally imposed by the employer by operation of the principle applicable to most contracts of employment, namely that an employer is not obliged to provide work merely to remunerate the employee upon due tender of service."

It seems to me that in this sentence these authors are in effect saying that an employer has a right to suspend an employee unilaterally pending the outcome of a criminal case provided he honours his obligation to remunerate the employee during that period.

[52] From the above authorities it is clear that, unless the appellant's case falls within those cases which are exceptions to the general rule, the general rule applies. That is that the respondent would have had no duty to provide the appellant with work and, therefore, had a right to suspend him on full pay and benefits. The appellant did not argue this matter on the basis that

the appellant fell into those recognised categories of exceptions to the general rule. There is no evidence that his absence from work would in any way have prejudiced him financially. The letter of suspension was clear that his suspension was on full pay and

benefits. There was also no evidence that his being at work was necessary to him for any educational purpose which he needed in order to acquire any qualification. Since the appellant's case did not fall into any of the exceptions to the general rule on suspensions at common law, it is governed by the general rule. That means that the respondent did have a right to suspend the appellant on full pay and benefits.

[53] Once it is accepted that the respondent had a right to suspend the appellant on full pay and benefits and that the respondent had no right to be provided with work, there can be no conceivable legal basis upon which it can be said that the respondent's conduct constituted a material breach or a repudiation of the contract of employment. If there was no repudiation, then the appellant was never vested with an election to cancel the contract or hold the respondent to it. Accordingly, the appellant's resignation was a simple resignation and was not an acceptance of a repudiation and no right to damages flowed from such resignation. In these circumstances the appeal in respect of the claim for damages falls to be dismissed.

The claim for leave pay

[54] The appellant also claimed payment of leave pay for a period of 27 days. If you make a claim for leave pay as an employee, you must first know what the source of your right to leave is. Is it contractual or statutory? You must also know the terms and

conditions which govern your leave. You must know what must happen before you acquire the right to leave or the right to leave pay. You must know how many days of leave you are entitled to.

[55] In this case the appellant's knowledge of the issues referred to in the preceding paragraph was found to be dismally poor when he gave his evidence. A proper examination of his evidence under cross-examination reveals that he was told by somebody

that he was entitled to 27 days of leave. He did not know why it was 27 days or how that number of days was arrived at. He tried to say that he was entitled to 20 days leave per each leave cycle but he had taken some leave days and had not worked out exactly how many leave days he had taken so that it could be determined whether or not they had all been taken into account in arriving at 27 days. He had also not informed the person who told him that he was entitled to 27 days of leave about all the other days of leave that he had already taken.

[56] It is very difficult to understand how a managing director of a company can come to court to claim leave pay without making sure that he had all the facts about the matters to which I have just referred. Even if he did not have the benefit of legal representation, I would have expected a managing director to ensure that he knew these facts before giving evidence in court. That it had not been made sure that he knew all this even though there were lawyers representing him leaves much to be desired. The appellant dismally failed to prove his claim to leave pay and the Court a quo was fully justified in dismissing his claim in this regard.

Claim for a bonus or 13th cheque

[57] In his statement of case the appellant did not allege that it was a term or condition of his contract of employment that he would be entitled to the payment of a so-called 13th cheque or bonus and under what circumstances he would be entitled to such payment. When in its pre-trial questions the respondent asked the appellant to specify the terms and conditions of the contract of employment upon which he was relying, the appellant specified paragraphs 7, 8 and 9 of its statement of case as well as what he called terms implied into a contract of employment by law. Paragraphs 7, 8 and 9 of the statement of claim say nothing about any

entitlement to a bonus or 13th cheque. No entitlement to a 13th cheque or bonus can be said to be implied by law. Some bonuses are paid to employees at the discretion of the employer. The payment of some bonuses depends upon the employee having completed a year or a cycle of 12 months in the employ of the employer. The appellant could not throw light on any of these issues. Once again he failed to prove his claim. The Court a quo was correct in dismissing his claim for the payment of a bonus.

Application for an amendment

- [58] As already stated earlier, at the trial of this matter the appellant called Mr Van Zyl to give evidence on his behalf and thereafter he testified although only after he had failed in his bid to get the Court to authorise that the respondent's witnesses testify first and he testify after – a very queer procedure, indeed. After the appellant had testified the respondent called Mr Kumar to the witness stand after whom Mr Turner testified for the respondent. All in all it was those four witnesses who gave evidence in this matter. It would seem that the trial had commenced on the 23rd August 2004 and had proceeded until the 27th August 2004 when it was adjourned to the 13th September
2004. Mr Van Zyl's evidence was not long. The appellant's evidence was quite lengthy although much of it was irrelevant. By Counsel for the appellant's own admission, he became aware of the need to amend the appellant's statement of case when the appellant was giving his evidence but he made what he termed a strategic decision not to make an application for an amendment of the statement of case at that time or at the conclusion of the appellant's evidence.
- [59] After the appellant had closed his case, the respondent's Counsel moved an application for absolution from the instance. Serious and lengthy argument ensued on that application. In support of the respondent's application for absolution from the instance, Counsel for the respondent drew everybody's attention to the appellant's pleaded case which the respondent had to meet including the absence of certain allegations in the appellant's statement of case. Counsel for the appellant could at that stage have informed the Court and Counsel for the respondent that he wanted to move an application for an amendment of the statement of case but did not.
- [60] The appellant served his notice of intension to apply for an amendment on the 9th September 2004. When the Court below dismissed the respondent's application for an absolution from the instance, the respondent called its main witness, Mr Kumar. After Mr Kumar had completed his evidence, the appellant's Counsel still did not move an application for an amendment and the respondent called its second witness, Mr Turner. It was after the respondent's second and final witness, Mr Turner, had completed giving his evidence at the end of the trial that the appellant's Counsel moved his application for amendment.
- [61] The effect of the amendment of the statement of case which the appellant sought was the following:

whereas, before, there was no allegation in the statement of case about what leave or what duration of annual leave the appellant was entitled to, there was now to be an allegation that he had been “entitled to twenty (20) days paid annual holiday leave.”

whereas, before, the appellants’ statement of case had no allegation to the effect that the appellant was entitled to payment of a 13th cheque or bonus, there was now to be an allegation that one of the terms or conditions of the verbal contract of employment was that he was entitled to payment of a 13th cheque or a bonus equal to one month’s salary.

whereas, before, the appellant’s statement of case had no allegation to the effect that it was a term or condition of the verbal contract of employment that the appellant would not be suspended or removed, there was now to be an allegation to the

effect that it was a term or condition of employment that the appellant would not be removed or suspended in his employment as a joint-managing director of the respondent for the duration of the contract except in accordance with the provisions of the Companies Act.

there was to be an amendment to the effect that on the 28th May 1999 the appellant had received an organogram “containing the so-called new structure of Auto Cable Industries (Pty) Ltd, a subsidiary of the respondent” and that “the said organogram reflected that the [appellant] was no longer the executive chairman or a director of the said Auto

Cable Industries (Pty) Ltd”.

there was to be an amendment of paragraph 20 of the appellant’s statement of case so as to increase the amount of R62 000, 00 there reflected to R73 636, 36 and to similarly amend the prayer in respect of the amount of R62 000, 00 initially included in the statement of case.

The appellant’s notice of intention to amend was simply that, namely a notice and was not supported by an affidavit.

[62] After the issuing and service of the appellant’s notice of intention to amend, the respondent issued and served a notice of objection. In terms of that notice the respondent stated that it objected to the proposed--- amendment of the appellant’s statement of case and advanced a number of grounds for its objection. The respondent raised the point that the appellant’s Counsel had delayed without any valid reason in taking steps to seek leave to amend despite the fact that he knew already during the appellant’s evidence-in-chief that the appellant’s case as pleaded had certain deficiencies.

[63] The respondent also pointed out in the notice of objection that the appellant knew from what was said during the respondent’s application for absolution from the instance that the respondent had proceeded on the basis of the appellant’s case as pleaded but had not brought the application for amendment earlier. The respondent also pointed out that it had presented its case on the basis of the appellant’s case as pleaded and to this end had limited its cross-examination of the appellant and his witness to the pleaded case. What the respondent was in effect saying in this regard was that, if the amendment was granted, the

case would

have to be re-opened and witnesses who had testified would have to be recalled because, for example, in the case of the appellant's

witnesses their cross-examination had been limited. The respondent also pointed out that, if the amendment was granted, it would have to bring its witness, Mr Kumar, from Malaysia back to South Africa at its costs in the event of a postponement of the matter. The respondent also pointed out that the proposed amendments sought to introduce allegations of fact that related to events that had occurred some six or seven years previously. It also pointed out that documentary evidence that the respondent could require to deal with the amended case might no longer be available. The respondent contended that all of this showed that it would be prejudiced by the granting of the proposed amendment.

[64] The Judge in the Court below dismissed the application for amendment on the basis that the appellant's Counsel's delay over a long period in bringing the application even though he had been aware from early in the trial of the need to bring it was without a valid reason and, therefore, unacceptable and because it would be prejudicial to the respondent. In my view the

learned Judge in the Court below was correct. It is completely unacceptable for a party who becomes aware at an early stage of

litigation or trial of the need to apply for an amendment of pleadings to decide for what Counsel for the appellant in this case

described as strategic reasons not to make such application for an amendment there and then or at an early stage and instead allow all witnesses on both sides to complete their evidence and only then apply for the amendment of his statement of case. It is wrong and Courts should make sure it is not done. The so-called strategic reasons for failure to make such application for amendment timeously are not good or valid reasons.

[65] In this matter the appellant's Counsel provided no valid or acceptable reasons for his delay in making the application. When a litigant has failed to comply with rules of Court or a statutory time limit in one way or another and requires to make an application for condonation, the legal position is that he is required to launch the application as soon as possible and should he, without an acceptable reason, delay in launching that application, the application for condonation can be dismissed on that ground alone. As a matter of principle I can see no reason why the fact that the appellant's Counsel delayed without an acceptable reason for as long as he did in making the application for an amendment should not on its own be a good enough reason for the Court a quo to have dismissed that application.

[66] In dismissing the appellant's application for amendment, the Court below was exercising a discretion. Such a decision cannot be set aside on appeal on the basis that the court of first instance erred. It can only be set aside if at least one of the

limited grounds upon which a discretionary decision can be interfered with is present. It is not enough that the appeal court thinks that the decision is wrong or that it would have exercised the discretion differently.

[67] The present case is not a case where the amendment sought by the appellant was going to put the pleadings in line with the evidence that had been led already. Certainly that is not factually true in respect of the main issue, namely, the amendment relating to suspension as a term of the contract of employment between the parties in this case. With regard to the suspension the appellant sought an amendment of his statement of case that was to be to the effect that it was a term or condition of the contract of employment between himself and the respondent that he would not be suspended during the period of the contract of employment. A reading of the record reveals that neither the appellant nor Mr Van Zyl, who testified for the appellant, gave evidence along the lines of the proposed amendment. Both Mr Van Zyl and the appellant testified that the issue of suspension was never discussed between the appellant and the respondent at the time of the appellant's appointment as a joint managing director of the respondent.

[68] In the first place, when Mr Van Zyl sought to testify in his evidence-in-chief about what the terms of the contract of employment were other than the ones that had been pleaded by the appellant in the statement of case, Counsel for the respondent objected to such evidence being led and not only did the Court uphold his objection and remarked that it would disregard that part of his evidence but also Counsel for the appellant indicated that the evidence of such terms or the terms were not important. Why did Counsel for the appellant say that Mr Van Zyl's evidence about the terms and conditions of the verbal contract of employment were not important despite the fact that Mr Van Zyl seems to have also been involved to some extent in the discussion of the terms of the

contract of employment of the appellant and Mr Zammit?

[69] Mr Van Zyl's evidence ran thus and I include the objection and reaction thereto:

"My condition then for leaving it in was that Annandale and Zammit would be appointed as the only executives for a period of 36 months, being the period that my shares would remain in the respondent and that no steps would be taken that could take them out of that management, that would effectively take the control of that company away from those two individuals. At that stage M'Lady

I had already experienced Kumar's approach in trying to manipulate a renegotiation of the transaction and I did not trust him at all, to the extent that at that first meeting I refused to enter into any further negotiations with Mr Kumar. It was later

communicated to me by Zammit that my terms had been accepted and that they were accordingly appointed.

Mr Kemack: M’Lady it is hearsay evidence, I object.

Court: Mr Jooste?

Mr Jooste: M’Lady Mr Zammit cannot be called, he is deceased, and in any event M’Lady it is common cause that the applicant was appointed. I am not sure why my learned friend is objecting to this evidence. Is he now disputing that they were appointed? Maybe he can help us on that.

Mr Kemack: M’Lady what troubles me is the expression ‘my terms had been accepted.’ Presumably Mr Annandale was the party who accepted the terms, he is sitting outside and can give evidence, that is evidence that can led by him rather than by this witness giving evidence in the most vague possible terms of what a deceased person said.

Mr Jooste: M’Lady yes it is not important, we will continue.

Court: Okay. I will disregard the last bit of his evidence then.”

A little later Mr Van Zyl went on to testify that Mr Kumar had confirmed to him what the terms of employment of the appellant and Mr Zammit would be despite the earlier ruling of the Court. Of course, Counsel for the respondent did not stand up to object again as he had already done so and his objection had been upheld and Counsel for the appellant had in effect said that the evidence of such terms was not important. Later on, still in his evidence-in-chief, Mr Van Zyl was asked whether at the time of the employment of the appellant “the question of the right to suspend any of the managing directors [was] raised between the parties between yourself, Mr Zammit and [the appellant]?” Mr Van Zyl’s answer was: “M’Lady the question of suspension as a mechanism to taking them out of control was never raised. What was agreed as the results of whatever mechanism existed, that they would not be taken out of control. The question of suspension was never raised.”

I pause here to make two observations. The one is that from the above quotation it is clear that Mr Van Zyl used the concept of suspension and that of the appellant or Mr Zammit not being taken out of control of the respondent as meaning different things. The second is that he did say that it was agreed that the appellant and Mr Zammit would not be taken out of control of the respondent.

Although under cross-examination, Mr Van Zyl tried to use this to suggest that the appellant and Mr Zammit could not be suspended, he conceded that they could go on leave. The appellant himself testified to a week’s leave that he took at some stage.

[70] It seems to me that, in so far as Mr Van Zyl’s evidence was that it was agreed that the appellant and Mr Zammit could not be taken out of the control of the respondent, such an agreement, if it existed, would not have necessarily meant that the appellant could not be suspended. This must be so because Mr Van Zyl testified that it was acceptable for the

appellant to be on leave. If the fact of the appellant being on annual leave was not inconsistent with being in control of the respondent, then I cannot see why being on suspension can be said to mean that the employee is not in control of the respondent and that his suspension would be a breach of the agreement that he would not be taken out of the control of the respondent. Accordingly, it seems that Mr Van Zyl's evidence that it was agreed that the appellant and Mr Zammit would not be removed from the control of the company, could not and did not mean that the appellant's suspension would be a breach of the alleged agreement not to take him out of the control of the respondent.

- [71] One of the amendments sought to be effected was to the effect that it was a term of the employment contract that the appellant and Mr Zammit would not be removed from the control of the respondent for the duration of the appellant's three year contract of employment except in accordance with the provisions of the Companies Act. No witness testified that it was a term or condition of the contract of employment of the appellant or of Mr Zammit or even Mr Van Zyl that the appellant could not be suspended during his employment as a joint managing director and could only be removed in accordance with the Companies Act. What happened is that,

after Mr Van Zyl had said in effect that the issue of suspension was not discussed but, he said that he thought to himself that the procedure that would be applicable if, hypothetically speaking, the appellant were to have abused his secretary sexually was that which is prescribed for the removal of company directors under sec 220 of the Companies Act, 1973. Mr Van Zyl never testified to the effect that there was even a discussion, let alone an agreement, that the procedure prescribed in sec 220 of the Companies Act would apply whenever the respondent found it necessary to suspend the appellant. This reinforces the point that the amendment relating to suspension which the appellant sought to effect was not in accordance with the evidence that had been led.

- [72] During his evidence in chief the appellant was asked to specify what the terms and conditions of his contract of employment were which were discussed at some meeting to which he referred between himself, Mr Zammit and Mr Van Zyl. He said that at that meeting no terms were discussed. However, he said that there was another meeting either in the afternoon of the day of that meeting or the next morning. The appellant continued and said "I consulted with Mr Van Zyl who was the CEO of the company and I asked him for more details and he then subsequently held meetings where the whole issue was finalised and he then advised me of the basic conditions." The appellant was then asked: "So he advised you of the basic conditions?" The appellant's answer to this question was: "Yes, in brief he did not give me all details. There was discussion as well that an agreement, an employment agreement was to be done. Mr Kumar undertook to attend to that."

- [73] The appellant was then asked what was discussed as the terms and conditions of the contract of employment. He mentioned the salary, the insurance on the vehicles that he and Mr Zammit would use, a 13th cheque and 20 days leave. He then said: "No other details were discussed, that Mr Van Zyl subsequently resolved with them." Under cross-examination the appellant said that he was assured that his employment conditions were the same as those

applicable to Mr Zammit and Mr Van Zyl. He was then asked whether he knew those conditions. His answer was: "I had a broad idea. I knew what the salary was, the leave entitlement, the car allowance and the cellphone and the rest of the detail I left to Mr Van Zyl." Later on, it was put to the appellant, while he was still under cross-examination, that at common law an employer is entitled to

suspend an employee. He was invited to comment. He, inter alia said:

"Well based on the employment conditions under which we got involved with this company, there was no, at no time anything like suspension was discussed and I cannot believe that and I couldn't believe that they came about with suspension since we were investors in the company and shareholders in the company."

[74] In the light of the above there is clear evidence that part of the appellant's application for amendment sought to amend the statement of case in a manner that was in conflict with not just the evidence of the respondent's witnesses but also with the evidence of the appellant himself and his only witness on the issue of the suspension. It must also be borne in mind that the application was being made on the basis that the appellant was no longer to call any other witness to testify. A court must dismiss an application for amendment of pleadings where such application is made after all the evidence has been led and the amendment is in conflict with all the evidence and the party making the application for amendment does not intend to re-open its case. The granting of an application for amendment in such circumstances would not serve any useful purpose.

[75] With regard to the appellant's application for amendment in regard to the issue of leave, the Court a quo was correct in dismissing the application because, if the amendment had been granted, the respondent or the appellant may have had to call a

further witness, namely, the official of the respondent who had calculated the 27 leave days that the appellant had testified about.

The appellant and his Counsel had been aware for a long time of the need to lead evidence of someone who knew how the 27 leave days were made up but had chosen not to call such a witness. There was no acceptable explanation as to why the appellant's Counsel had made such election and the Court was right not to grant the applicant any indulgence in this regard.

[76] With regard to the application for amendment of the appellant's statement of case in respect of the 13th cheque, on this issue, too, the appellant's Counsel had had ample time to apply for an amendment but he had elected not to do so. He had no acceptable explanation for having elected not to make the application for amendment earlier. The Court a quo was right to dismiss the application in regard to this issue as well.

[77] In the premises the appeal is dismissed with costs.

Zondo JP

I agree.

Patel JA

A. Kruger AJA

Appearances:

For the appellant : Adv Jooste

Instructed by : Mark Anthony Byl Attorneys

For the respondent : Adv Kemack

Instructed by : Werkmans Attorneys

Date of judgment : 13 August 2009

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