

REPUBLIC OF NAMIBIA



LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

Case no: LCA 21/2017

In the matter between:

HERMIE VAN ZYL
THEA RAATH

1ST APPELLANT
2ND APPELLANT

And

NAMIBIA SALES & MARKETING CC

RESPONDENT

Neutral citation: *Van Zyl v Namibia Sales Marketing CC (LCA 21/2017) [2017]*
NALCMD 28 (01 September 2017)

Coram: **UEITELE, J**

Heard: **04 July 2017**

Delivered: **01 September 2017**

Flynote: Labour law - Constructive dismissal - What constitutes - *Onus* on employee to prove that he did not intend to terminate contract - Constructive dismissal present where employer forcing employee to resign or where work environment such that employee would find it difficult to continue working there- Principles relating to constructive dismissal restated.

Summary: The appellants, who were employed by the respondent as sales representative and sales manager respectively, resigned from the respondent's employment when it became apparent that the respondent faced financial difficulties. After the appellants resigned from the respondent's employment the respondent embarked on a retrenchment process and terminated the contracts of employment of all its employees.

The appellants alleging that the respondent embarked on a disguised transfer of business in order to avoid paying the appellants severance packages filed a complaint of unfair dismissal with the office of the Labour Commissioner. An arbitrator dismissed the complaint of unfair dismissal (constructive dismissal). The appellants thereafter appealed to this court.

Held that in this case the appellants had voluntarily resigned and that there had been no constructive dismissal.

Held further that the appellants failed to discharge the onus resting on them to prove that they were entitled to a Franke commission, or that there was a disguised transfer of business.

ORDER

The appeal is dismissed.

JUDGMENT

UEITELE, J

The parties

[1] The first appellant in this matter is Hermie Van Zyl, who was employed by the respondent from 17 May 2010 as sales representative until 30 June 2016 when he

resigned from his employment. (I will, in this judgment, refer to the first appellant as 'Mr Van Zyl').

[2] The second appellant is Thea Raath who was employed by the respondent from 1 July 2005 as sales manager until 15 August 2016 when she resigned from her employment. (I will, in this judgment, refer to the second appellant as Ms Raath). When I need to refer to the appellants jointly, I will refer to them as the appellants, but where I need to refer to them individually I will refer to them as Van Zyl or Raath.

[3] The respondent in this matter is Namibia Sales & Marketing CC a close corporation registered in accordance with the Laws of the Republic of Namibia. (I will in this judgment refer to Namibia Sales & Marketing CC as 'the respondent'). The respondent did not participate in the appeal proceedings.

The background to this appeal

[4] As I have indicated above the appellants were employed by the respondent, Van Zyl started his employment with the respondent on 17 May 2010 as a sales representative. Prior to the year 2013 it appears that the respondent was doing well financially. Van Zyl testified that prior to that date each sales representative had a motor vehicle assigned to him or her and they were issued with the respondent's credit cards when on official duties and were also issued with the respondent's petrol cards that they used to fuel up the motor vehicles when they travelled on company business.

[5] During December 2015 Van Zyl was approached by a company called T & C who offered him a position of sales representative. When he was offered that position he approached a certain Minnie the sole and managing member of the respondent and shared with him the offer that he received from T & C. Mr Minnie allegedly expressed the desire to keep him and matched the offer that Van Zyl received from T & C, he accordingly decided against leaving the employment of the respondent.

[6] At the beginning of the year 2016 matters, according to Van Zyl, started to change for the worse. He testified that when the sales representatives had to travel they had to use one vehicle because the other vehicles would not have fuel, the credit and the petrol cards were withdrawn and stock that they had to sell and deliver to clients was arriving

late and in 'in drips and drops'. After these experiences and after having heard 'rumours' that the respondent was in financial difficulties Van Zyl went back to T & C and enquired whether the position of sales representative which that company had offered to him was still available. After he received confirmation that the position was still available he tendered his resignation to Minnie and on 1 July 2016 he commenced employment with T & C.

[7] As regards Ms Raath she commenced her employment with the respondent on 1 July 2005. Ms Raath testified that she was informed by another colleague that also worked for the respondent that Minnie told him that he (Minnie) was closing down the respondent and that he was only taking a few people with him to his new company. Ms Raath did not, in her evidence, identify the colleague who told her about the alleged imminent closure of the respondent. The unidentified colleagues of Raath kept on telling her to start looking for another job before it was too late. Because of this information that she received Ms Raath on 12 July 2016 addressed a letter in the following terms to Minnie:

'Firstly I would like to thank you for giving me the opportunity to work for you for 13 years.

Please accept my resignation from Namibia Sales and Marketing. I was informed the company is closing and had no other choice to seek new employment. My last working day will be the 15th of August 2016.

Thank you for everything you have done for me in the past it was a pleasure to work with you.

Regards

Thea Raath'

[8] After their resignation from the respondent, the respondent commenced a process of retrenchment whereby it retrenched most of its employees. The appellants alleging that the respondent embarked on a disguised transfer of business in order to avoid paying them severance packages filed, in terms of s 85 of the Labour Act, 2007, a complaint of unfair dismissal and failure to pay severance pay with the office of the Labour Commissioner, on 17 October 2016. The Labour Commissioner, designated a certain Mr. Nicolhaus Mouers to conciliate and arbitrate over the dispute.

[9] The matter was first conciliated and at the end of the conciliation proceedings on 16 December 2016 the parties agreed to postpone the matter to 24 January 2017 to continue with the conciliation proceedings. On the 24th day of January 2017 (the date set for the continuation of the conciliation proceedings) the respondent failed to appear at that hearing. Following the failure by the respondent to appear at that hearing, the arbitrator postponed the hearing to 28 February 2017 for arbitration proceedings. Following numerous failed attempts by the arbitrator to get hold of the respondent the arbitrator proceeded to arbitrate the matter in the absence of the respondent. At the conclusion of the arbitration proceedings the arbitrator amongst others things, on 30 March 2017, made the following ruling:

'5.1 As a consequence I order that the respondent must pay to the applicants as follows:

- (a) Outstanding 17 leave days of N\$ 41 974.93 in respect of the 1st applicant [Van Zyl];
- (b) Outstanding 22 leave days of N\$ 50 752.52 in respect of 2nd applicant [Raath];
- (c) Outstanding severance pay of N\$ 85 000.00 in respect of 3rd applicant.
- (d) The said amount must be paid on or before the 2nd May 2017'.

The appeal, the grounds of appeal

[10] Aggrieved by the award of the arbitrator handed down on 30 March 2017 Van Zyl and Raath on 26 April 2017, in terms of s 86 (15) of the Labour Act, 2007, appealed against 'parts' of the arbitration award. The parts of the award appealed against are the finding by the arbitrator that the respondent: (a) did not constructively dismiss the appellants, (b) did not effect a disguised transfer of business from Namibia Sales & Marketing CC to Kalahari Distributors CC, (c) the finding by the arbitrator that the appellants were not entitled to notice pay, severance pay, Franke commission, incentive pay and reimbursement of traveling expenses in respect of a trip to Oshakati.

[11] As I have indicated above the respondent did not participate in the arbitration proceedings, he equally did not participate in the appeal hearing despite efforts having been made to serve the notice of appeal on the respondent's registered address. The

appeal thus proceeded on an unopposed basis. It is therefore clear that the issues that I am called upon to resolve are:

- (a) Whether, on the evidence placed before the arbitrator, he was correct in finding that the respondent did not constructively dismiss the appellants (Van Zyl and Raath).
- (b) Whether, on the evidence placed before the arbitrator, the arbitrator was correct in finding that the respondent did not effect a disguised transfer of business from Namibia Sales & Marketing CC to Kalahari Distributors CC; and
- (c) Whether, on the evidence placed before the arbitrator, the arbitrator was correct in finding that it was not a condition of employment that the appellants would be paid Franke Commission, incentives for achieving certain targets and reimbursement of expenses incurred by Van Zyl and Raath while performing the respondents' duties.

[12] I find it appropriate to, albeit briefly, before I consider the issue which I am called upon to decide in this appeal briefly set out legal principles governing those aspects.

The applicable legal principles

[13] In the matter of *Transnamib Limited v Swartz*¹ this Court held that constructive dismissal occurs where:

‘... an employee terminates the employment, or agrees to the termination, but this termination or agreement was prompted or caused by the conduct of the employer...’

[14] The court in that case (i.e. the *Transnamib Limited v Swartz* matter) further approved the submission that constructive dismissal takes place when the employer renders the relationship with the employee so intolerable that the employee (feels that he) has no option (but) to resign, the termination of the contract becomes that of the employer.

¹ NLLP 2002(2) 60 (NLC).

[15] In the matter of *Kavekatora v Transnamib Holdings Ltd and Another*² this court accepted the concept of constructive dismissal as eloquently explained by Cameron JA in the South African Supreme Court of Appeal in the following way.³

'[8] In employment law, constructive dismissal represents a victory for substance over form. Its essence is that although the employee resigns, the causal responsibility for the termination of service is recognised as the employer's unacceptable conduct, and the latter therefore remains responsible for the consequences. When the labour courts imported the concept into South African law from English law in the 1980s, they adopted the English approach, which implied into the contract of employment a general term that the employer would not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust with the employee: breach of the term would amount to a contractual repudiation justifying the employee in resigning and claiming compensation for dismissal.'

And:

'[12] In detailing this right, the parties freely invoked the carefully considered jurisprudence the labour courts have evolved in dealing with unfair employer-instigated resignations under the labour relations legislation of the past three decades. These cases have established that the *onus* rests on the employee to prove that the resignation constituted a constructive dismissal: in other words, the employee must prove that the resignation was not voluntary, and that it was not intended to terminate the employment relationship. Once this is established, the inquiry is whether the employer (irrespective of any intention to repudiate the contract of employment) had without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust with the employee. Looking at the employer's conduct as a whole and in its cumulative impact, the courts have asked in such cases whether its effect, judged reasonably and sensibly, was such that the employee could not be expected to put up with it.

[13] It deserves emphasis that the mere fact that an employee resigns because work has become intolerable does not by itself make for constructive dismissal. For one thing, the employer may not have control over what makes conditions intolerable. So the critical circumstances must have been of the employer's making. But even if the employer is responsible, it may not be to blame. There are many things an employer may fairly and reasonably do that may make an employee's position intolerable. More is needed. The employer

² 2012 (2) NR 443 (LC). Also see *Kasuto v Namibia Wildlife Resort (LCA 23/2013) [2013] NALCMD 37 (6 November 2013)*.

³ *Murray v Minister of Defence* 2009 (3) SA 130 (SCA) ([2008] 6 BCLR 513; [2008] 3 All SA 66) at para 8.

must be culpably responsible in some way for the intolerable conditions: the conduct must (in the formulation the courts have adopted) have lacked reasonable and proper cause. Culpability does not mean that the employer must have wanted or intended to get rid of the employee, though in many instances of constructive dismissal that is the case.¹⁴ (My Emphasis)

Discussion

[16] Having briefly set out the legal principles I now proceed to apply the legal principles to the facts of this matter. From the principles set out above it follows that it was incumbent upon Van Zyl and Raath to first establish that their resignations were not voluntary and was not intended to terminate the employment relationship. After establishing this, they would further need to establish that the respondent had without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or damage the employment relationship. As was stressed by Cameron JA, the mere fact that an employee resigned because the work had become intolerable would not necessarily translate itself into a constructive dismissal. The employer would need to have been culpably responsible in some way for the intolerable conditions.

[17] In considering the first-stage enquiry, the central question is whether Van Zyl and Raath proved that they had no intention to end the employment relationship. Van Zyl's evidence shows, that it was the financial difficulties which the respondent was facing combined with the offer from T&C that led him to tender his resignation from the respondent. Herein lies Van Zyl's motivation for his resignation. Raath in her evidence testified that it is the 'rumors' that were going around that the respondent was facing financial problems and could 'close shop' at any time that led to her tendering her resignation. In her letter of resignation (which I have quoted above in paragraph [7]) she pleaded with the respondent for it to accept her resignation. She said she was informed that the respondent was closing so she had no choice but to seek new employment. Herein lies Raath's motivation for her resignation. In my view both Van Zyl and Raath voluntarily opted to resign; in other words, they intended to terminate the employment relationship.

⁴ Also compare with the case of *Cymot (Pty) Ltd v McLoud*, 2002 NR 391 (LC).

[18] The next stage of the enquiry is whether the respondent (irrespective of any intention to repudiate the contract of employment) had without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust with Van Zyl and Raath. On the evidence of both Van Zyl and Raath the respondent was facing financial difficulties, on the evidence of Ms Smith who was part of the complainants at the arbitration hearing the writing with respect to the respondent's financial woes was already on the wall as early as 2013. She testified that she did discuss the financial situation of the respondent with Minnie and brought it to Minnie's attention that the respondent's expenditures were exceeding its income.

[19] It cannot thus be said that the respondent had engaged in conduct which rendered the further employment of the appellants intolerable. The respondent was thus not culpably responsible for Van Zyl and Raath resignation in the sense that the respondent had without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust with Van Zyl and Raath. The arbitrator was, in my view, accordingly correct in finding that the appellants did not discharge the *onus* to establish that they were constructively dismissed in the circumstances.

[20] Mr Philander who appeared on behalf of the appellants argued that in respect of the Franke Commission, the evidence adduced was that the commission was for a year during which the appellants sold Franke geysers and the respondent's Mr Minnie informed them that he did not get the commission from South Africa. Second appellant contacted the South African agent and confirmed that the respondent did receive the commission. Because this evidence was not contested, argued Mr Philander, the appellants were entitled to the Franke commission.

[21] The fact that evidence is uncontested does not by itself and without more mean that the court must just accept that evidence. It is settled that uncontradicted evidence is not necessarily acceptable or sufficient to discharge an onus. In *Kentz (Pty) Ltd v Power*⁵ Cloete J undertook a careful review of relevant cases where this principle was endorsed and applied. The learned judge pointed out that the most succinct statement of the law in this regard is to be found in *Siffman v Kriel*⁶, where Innes CJ said:

⁵ [2002] 1 All SA 605 at para [16].

⁶ 1909 TS 538.

'It does not follow, because evidence is uncontradicted, that therefore it is true ... The story told by the person on whom the onus rests may be so improbable as not to discharge it.'

[22] It is therefore necessary to establish what facts the appellants placed before the arbitrator to establish their claim to the Franke commission. Raath testified as follows in respect of her claim to the Franke commission:

'The Franke commission was for a year we were selling the Franke geysers and Riaan just kept on telling us that he is not getting the commission from South Africa. And he was lying. Because I phoned the people in South Africa and he was getting the ... For the sale of the geysers... But he never gave it to us.'

[23] Van Zyl testified as follows in respect of the claim to the Franke commission:

'The Franke commission was paid to us on a quarterly basis that we were getting thirteen thousand. Obviously we did not see the targets or the amounts of sales that we did so that is why took it on thirteen thousand that we were getting. It is for sales that we did the Franke geysers. The heating systems. So that is the claim for the Franke commission. ...Then there is four quarters ... we would get thirteen thousand per quarter.'

[24] In my view the appellants placed no facts before the arbitrator to demonstrate that they were entitled to a Franke commission and the amount of the commission that they were entitled to. I say no facts were place before the arbitrator because there is no evidence that it was a term of the employment contract whether verbally or agreed to in writing that appellants were entitled to a commission. There is no evidence of what percentage of the sales of the geysers constituted the commission, there is no evidence as to the period in respect of which the commission is claimed. The *onus* was on the appellants to prove all these aspects. It must be borne in mind that the establishment of facts must be by way of admissible evidence.

[25] In respect of the allegation that the conduct of the respondent was nothing more than a disguised transfer of the respondent's business from Namibia Sales & Marketing CC to Kalahari Distributors CC; in order to circumvent the respondent having to redeploy the appellants to Kalahari Distributors CC and to circumvent the provisions of the Labour Act, 2007 insofar as it pertains to reorganisation of the respondent's business operations Raath testified (I quote verbatim from the record) as follows:

'REPRESENTATIVE FOR THE APPLICANT It is indicated there Kalahari Distributors. And you will see Mr Riaan Minnie's name at the bottom of this document. Do you have any knowledge of this company and when it started and why it started?

THE APPLICANT Yes I remember that the Kalahari Distributors when I was working by Namibia Sales and Marketing he opened that company, company so together with Fannie Alberts. He also had this company because I must. Some of the working I was also working for Kalahari Distributors to put process the stock, to process the computer ...

'REPRESENTATIVE FOR THE APPLICANT Is there a difference between what Namibia Sales and Marketing did and what Kalahari Distributors is doing?

THE APPLICANT There is, the both the both of them was, is a wholesaler.'

[26] Van Zyl testified as follows in respect of the alleged disguised transfer (I quote verbatim from the record):

'REPRESENTATIVE FOR THE APPLICANT Go to page number 3 please. It is indicated here Kalahari Distributors. Mr Minnie's also signed this document. Can you give the Chairperson a background of what you know about Kalahari Distributors and who the owners of this business is.

THE APPLICANT Kalahari Distributors if I am not mistaken was opened two years ago for his father in law. And I think personally it was, he knew what he was doing. It was all two (2) year plan to stop Namibia Sales and Marketing and take everything over to Kalahari.'

[27] The evidence of Raath and Van Zyl is not admissible evidence, it is, in my view, nothing but unfounded speculations and conclusions drawn by both Raath and Van Zyl. There is not a shred of evidence that Mr Minnie the sole member of Namibia Sales and Marketing CC transferred the business of that close Corporation to Kalahari Distributors CC and why he transferred that business. The evidence that was presented to the arbitrator was that the respondent's financial difficulties let to the 'shut down' of Namibia Sales and Marketing CC. The appellants bore the *onus* to place facts before the arbitrator to prove the alleged disguised actions of Minnie. The appellants failed to place those facts before the arbitrator.

[28] In respect of the appellants contention that the arbitrator, on the facts and evidence placed before him erred in finding that the appellants were not entitled to be paid incentives for achieving certain targets and to be reimbursed for expenses incurred by them while performing the respondent's duties, I need only to state that I have read the record and could not find a single piece of evidence indicating whether the alleged incentives were payable, what the amount of the alleged incentives was and the circumstances under which the incentives were payable.

[29] The arbitrator was, in my view, accordingly correct in finding that the appellants did not discharge the *onus* to establish that they were entitled to be paid the Franke Commission, incentives for achieving certain targets and reimbursement of expenses allegedly incurred by them while performing the respondents' duties.

[30] I accordingly make the following order.

The appeal is dismissed.

SFI Ueitele

Judge

APPEARANCES:**FIRST & SECOND APPELLANTS:**

R Philander
of ENSAfrica | Namibia
(Incorporated as Lorentz
Angula Inc, Windhoek.

RESPONDENT:

No appearance