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Mafika v South African Broadcasting Corporation Ltd [2010] ZALC 1 (14 January 2010)

JUDGEMENT: VAN NIEKERK J

Introduction

The applicant was employed by the respondent (the SABC) as its legal adviser in terms of a fixed term contract. The contract was to terminate automatically three years later. Before the 3 year period expired, the applicant sent a sms to the SABC's group chief executive officer, Mpofu, indicating that he "quit with immediate effect". The applicant contends that the sms did not constitute a valid termination of his employment contract because any notice of termination of employment had to be given in writing and because in any event, he withdrew his resignation before it was accepted by the SABC. In these proceedings, instituted in terms of section 77 of the Basic Conditions of Employment Act (BCEA), the applicant claims his remuneration for the period August 2007 to the end of the agreed fixed term. The SABC contends that it is not liable to the applicant because the sms sent on 25 August 2007 constituted a valid

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resignation; alternatively, because the applicant repudiated his contract of employment by sending the sms and failing afterward to tender his services.

Legal issues

The parties agreed that the preliminary issues raised by the pleadings were whether the sms sent by the applicant on 25 August 2007 constituted a valid resignation and if so, whether it was open to the applicant to revoke his resignation prior to its being accepted by the SABC. .

Legal principles

A resignation is a unilateral termination of a contract of employment by the employee. The Courts have held that the employee must evince a clear and unambiguous intention not to go on with the contract of employment, by words or conduct that would lead a reasonable person to believe that the employee harboured such an intention (see Council for Scientific & Industrial Research (CSIR) v Fijen (1996) 17 ILJ 18 (AD), and Fijen v Council for Scientific & Industrial Research (1994) 15 ILJ 759 (LAC)).

Notice of termination of employment given by an employee is a final unilateral act which once given cannot be withdrawn without the employer's consent (see Rustenburg Town Council v Minister of Labour & others 1942 TPD 220;



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Potgietersrus Hospital Board v Simons 1943 TPD 269, Du Toit v Sasko (Pty) Ltd (1999) 20 ILJ 1253 (LC) and African National Congress v Municipal Manager, George & others (550/08) [2009] ZASCA 139 (17 November 2009) at para [11]).

In other words, it is not necessary for the employer to accept any resignation that is tendered by an employee or to concur in it, nor is the employer party entitled to refuse to accept a resignation or decline to act on it. (See Rosebank Television & Appliance Co (Pty) Ltd v Orbit Sales Corporation (Pty) Ltd 1969 (1) SA 300 (T)).

If a resignation to be valid only once it is accepted by an employer, the latter would in effect be entitled, by a simple stratagem of refusing to accept a tendered resignation, to require an employee to remain in employment against his or her will. This cannot be – it would reduce the employment relationship to a form of indentured labour.

This is not to say that a resignation need not be communicated to the employer party to be effective – indeed, it must, at least in the absence of a contrary stipulation (African National Congress v Municipal Manager, George & others (supra)).



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A resignation is established by a subjective intention to terminate the employment relationship, and words or conduct by the employee that objectively viewed clearly and unambiguously evince that intention. The Courts generally look for unambiguous, unequivocal words that amount to a resignation- see, for example, *Fijen v Council for Scientific & Industrial Research* (supra) where the Labour Appeal Court stated that to resign, the employee had to **'act in such a way as to lead a reasonable person to the conclusion that he did not intend to fulfil his part of the contract.'**

The requirement of a clear and unambiguous intention to terminate the contract may often be more easily stated than applied. As Mark Freedland observes, if a worker utters words seeming to indicate an intention to leave employment, the utterance may be unclear, the product of uncertainty, or a manifestation of anger rather than an expression of a definite intention to terminate the employment relationship. When it is claimed that an employee has decided to terminate his or her employment of his or her own volition, it may be necessary to scrutinise the genuineness of that volition to determine, for example, whether the employee's action is the result of an unacceptable degree of pressure by the employer, or whether the employer has been over-eager to treat an impulsive decision as a settled one.



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Analysis

To the extent that the applicant testified that he made the decision to terminate his employment in stressful circumstances and in an angry response to his suspension, the applicant did not claim that he was incapable of appreciating what he was doing, or the consequences of his actions. On the contrary, his testimony was that when he sent the sms, he intended to resign but that some six weeks later he regretted the decision. In the email subsequently addressed to Mpofu, the applicant contended that his contract remained in existence not on account of any diminished capacity at the time he sent the sms, but because after a lengthy period of reflection he considered his continued employment a means to the end of his restored reputation. However noble this motive may be, it cannot in law serve as a basis to resurrect the applicant's contract of employment some six weeks after its termination in circumstances where the demise of the contract was brought about by his applicant's voluntary and deliberate conduct.

In the court's view, the sms sent by the applicant to Mpofu on 25 August 2007 is a clear statement of the applicant's intention to terminate his employment. There is nothing unclear or equivocal about the communication to Mpofu, and its terms are not ambiguous.



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Mr Hardie, who appeared for the applicant, contended that the sms sent by the applicant to Mpopu on 25 August did not constitute a valid resignation. For the applicant's resignation to have been effective, Mr Hardie submitted, it must have been tendered in writing and accepted by the SABC. Since neither condition had been met, the applicant's contract continued to subsist beyond 25 August 2007.

In support of his argument, Mr Hardie relied on s 37 (4) (a) of the BCEA, which requires that notice of termination of a contract of employment must be given in writing, except when it is given by an illiterate employee, and **paragraph 9 of the personnel regulations**, which similarly refer to notice of termination 'in writing'.

The court held that it was not convinced that where there is a resignation in the form of a clear and unequivocal intention by an employee not to continue with the employment contract, it is invalid only because it was not reduced to writing – it seems that this is a requirement that may be waived.

The court went on further to hold that a communication by sms is a communication in writing. Section 12 of the Electronic Communications and Transactions Act, 25 of 2002 provides:



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“A requirement in law that a document or Information must be in writing is met if the document or Information is-

(a) in the form of a data message; and

(b) accessible in a manner usable for subsequent reference...”

Section 1 defines a ‘**data message**’ to mean ‘**data generated, sent, received or stored by electronic means...**’

(See also the recent decision by this court in *Jafta v Ezemvelo KZN Wildlife* [2008] ZALC 84; [2008] 10 BLLR 954 (LC)). The applicant’s resignation by sms was therefore a resignation submitted in writing.

In summary: on the facts disclosed by the evidence (and admitted in the pleadings and the pre-trial minute), the legal issues determine the matter against the applicant. The applicant resigned. To the extent that it was necessary, his resignation was tendered in writing. His resignation could not be withdrawn without the SABC’s consent, which was never given. In these circumstances, the applicant cannot survive absolution.

Absolution from the instance was granted, with costs.

