IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT:

BRAAMFONTEIN

CASE NO: PA1/09

DATE: 2010-05-11

In the matter between

CHRISTIANA JACOBA JORDAAN	**APPELLANT**
And	
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**FIRST RESPONDENT**
COMMISSIONER J A VAN DER WALT	**SECOND RESPONDENT**
HOMENET CORNERSSTONE	**THIRD RESPONDENT**
CORNERSTONE HOMENET	**FOURH RESPONDENT**
LANCE DEREK GOUWS	**FIRTH RESPONDENT**
CORNERSTONE GRAPHICS CC CK96/51361/23 t/a HOMENET CORNERSTONE BEACON BAY	**SIXTH RESPONDENT**
LANCE DEREK GOUWS in his capacity as MEMBER of CORNERSTONE GRAPHICS CC CK96/51361/23 t/a HOMENET CORNERSTONE	

BEACON BAY	**SEVENTH RESPONDENT**
D.T. GOUWS PROPERTIES CC	
(Reg. No. 2003/077620/23)	
t/a HOMENET CORNERSTONE	**EIGTH RESPONDENT**
D.T. GOUWS PROPERTIES CC	
t/a CORNERSTONE HOMENET	**NINTH RESPONDENT**
CORNERSTONE ESTATES	**TENTH RESPONDENT**
HOMENET CORNERSTONE BEACON BAY	**ELEVENTH RESPONDEN**

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Coram: **WAGLEY DJP, DAVIS JA, MUSI AJA,**

J U D G M E N T

DAVIS JA: This is an appeal against the court *a quo's* refusal to review and
20 set aside an arbitration award of the second respondent. In terms of that award, the second respondent held that the appellant had established a case of constructive dismissal in terms of Section 186(1)(e) of the Labour Relations Act, 66 of 1995 (LRA).

The court *a quo* per Cele J, determined the matter on the basis that the appellant's review application was late and that she had failed to apply for condonation. This point was not persisted with by the sixth respondent on appeal. It appears that the merits of the dispute were not canvassed in full by

the court *a quo*. However, the notice of application for leave to appeal sets out as the grounds of leave to appeal; inter alia that the court *a quo* erred in its application of the facts to section 145 of the LRA. Accordingly I propose to deal with this matter on the merits of the case as opposed to the issue of condonation.

Briefly the facts are as follows:

The appellant commenced employment with the sixth respondent on 1 July 2002 in a position of an estate agent. She initially worked out of the Southern Wood office of the sixth respondent ("the company"), working under the direct supervision of Mr Lance Gouws, the majority shareholder of the company. In early July 2004, after a request, she went to work at the Beacon Bay office of the company which was managed by her husband Mr Jacques Jordaan, who held 34 percent shareholding in the Beacon Bay business of the company.

It is common cause that the relationship between Mr Gouws and Mr Jordaan deteriorated. At a meeting on 22 July 2004, Mr Gouws invoked powers possessed by him as a two third majority shareholder of the company and removed Mr Jordaan from his position as manager. Mr Jordaan continued to be an employee of the company and continued to hold his minority shareholding. From this moment, negotiations proceeded between Messrs Gouws and Jordaan to ensure the resignation of Mr Jordaan, the purchase of his shares, the calculation of the value of those shares and any dividends which might have been forthcoming.

An important issue raised at a meeting on 22 July 2004 was that of a restraint of trade agreement. It appears that the following was recorded as part of the proceedings of that meeting:

> "Given the current market conditions there is a necessity to protect the proprietary interests of the corporation in order to protect the goodwill. Therefore, it becomes an operational requirement to put into place a restraint of trade. Be aware that any choosing not to sign it run the possible\conceivable risk of having their employment terminated for operational reasons. This would be a last resort to protect the business".

On 27 July, Mr Gouws met staff members including appellant. It appears that, at that meeting, notwithstanding disputes in the evidence, the employees were to be granted a 30 period to consider a restraint of trade agreement which had been prepared. Mr Gouws informed the meeting that he had decided to require the employees to sign a restraint of trade, after having taken advise from his attorney.

The question arose from appellant as to what would happen, were she to decline to sign the restraint of trade agreement. It appears, notwithstanding various differences in the evidence particularly between her and Mr Gouws, that the latter indicated that he would not fire her but there was a possibility that she would be retrenched.

The appellant was then asked the following question:

> "I also asked what will happen if I do not sign the restraint of trade … He said sorry, if you do not sign you will have to leave the company. I said okay, he said you will have to leave the company, then I said to him, okay Lance that is fine I will go no problem. I said to him, are you going to fire me. Yes, I asked him if he is going to fire me and he said, no I will retrench you".

That was the evidence of appellant.

Mr Gouws' testimony was to the effect that he considered the possibility of retrenchment.

It was common cause that appellant then asked Gouws for a letter, either dismissing or retrenching her. Gouws was not prepared to provide the appellant with such a letter, indicating that he had first a need to consult further with his attorney. In this connection, Mr Gouws testified that he did not intend to enforce the restraint and was not intent on providing the appellant with the letter from his attorney. In fact, he testified thus:

> "After your meeting with Mrs Jordaan on or about 27 August, what was on this document as far as you understood? Well it was plain that she was determined to try and get from me some sort of a letter to be used against me at a later stage. I had no intention at that stage of enforcing the restraint of trade, because by that stage a number of staff members had already left. So I was not going to enforce her, I did not want to tell her that at that stage.

> The fact that I told her I had to consult with my attorney was to fob her off, because I was never going to give her that. The letter of retrenchment? Well as I understand it, only paid employees may be retrenched, so I never ever used the word retrenched because I did not believe it applicable to our industry whatsoever, and I never used the word fire, I constantly and repeatedly used the word here termination, and that the employment terminated for operational reasons. That is the wording I used again and again and again. I was very careful not to use any other terminology whatsoever".

On 31 August, the appellant persisted as to whether she was to obtain a letter which Gouws had indicated will be generated from his attorney. He responded that he had not as yet had the opportunity to speak to his attorney and it was at this point according to appellant that she felt compelled to resign. She prepared a letter of resignation which she handed to Gouws. That letter of resignation referred to a meeting of 27 August 2004 and then records the following:

> "As I refused to sign the restraint of trade, you then said I must leave Homenet… I then said I will only if my bond commissions were paid out to me. You agreed to pay this only if I do not contact Errol Theron about any future business, which I did not accept. You were going to give me a letter by 31 August 2004

> stating that I am retrenched because I do not want to sign to the restraint of trade. As I have not yet received this letter I am now resigning with immediate effect".

Following this resignation, appellant commenced employment with a business which was run by her husband and which, it is common cause, was in competition with that of the Company.

So much therefore for the facts. The case turned on appellant's argument that this was an instance of a constructive dismissal, as defined in terms of Section 186(1) (e) of the LRA which defines dismissal to include the case:

> "where an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee".

Constructive dismissal therefore, amounts to a position where the employee terminates the employment contract in circumstances where the conduct of the employer compels the termination by the employee. Accordingly, it is treated as if the termination had taken place by way of an act of the employer.

In *Minister of Home Affairs v Hambibge N.O. & Another,* (1999) 20 ILJ 2632 (LC), Landman J said:

> "Section 186(1) (e) of the LRA recognises the concept of constructive dismissal. Constructive dismissal occurs when an employee terminates a contract unilaterally because the employer has made continued

> employment intolerable. The termination of the contract is in these circumstances deemed not to be a voluntary termination by the employee but an act of dismissal by the employer. The concept is capable of embracing many different factual situation …
>
> The circumstances (of constructive dismissal) are so infinitely various that there can be, and is, no rule of law saying what circumstances justify and what do not. It is the question of fact for the tribunal of fact".

10 The point, however, is that the law, since this dictum, has set out a fairly clear set of guidelines of how to approach a dispute predicated on a constructive dismissal. Thus, in *Sappi Kraft (Pty) Ltd t/a To Gain Mill v Majake N.O. & Other,*(1998) 19 ILJ 1240 at 1250, the court set out a two stage approach which was required to be followed in these disputes. In the first place, an employee who leaves a place of employment bears the onus of showing that the employer effectively dismissed the employee by making her continued employment intolerable. Once this is established, a second stage must be applied and this concerns an evaluation of whether the dismissal was unfair. The court, however, said correctly:

20 > "The two stages that I have set out above are however not independent stages. They are two stages in the same journey and the facts which are relevant in regard to the first stage may also be relevant in regard to the second stage".

In short, when faced with a case of constructive dismissal, an employee, such as appellant, bears an initial onus of showing, on an objective standard, that the employer has rendered the employment relationship so intolerable that no other option is reasonably available to an employee, save for termination of their relationship.

The point is perhaps best set out in a judgment of this Court by Conradie JA in *Old Mutual Group Schemes v D Dreyer & Another*, (1999) 20 ILJ 2030 (LAC) 2036:

> "Buitendien sou so 'n werknemer wat uit die bloute bedank dit gewoonlik moeilik vind om 'n hof te oortuig dat hy werklik konstruktief ontslaan is. Die bewyslas rus op die werknemer ... Die bewyslas is nie 'n ligte een nie ... Dit is nie vir 'n werknemer maklik om aan te toon dat 'n werkgewer die voortsetting van sy diesn onuithoudbaar gemaak het nie. Hy kan hom nie maar net op frustrasies en irritasies verlaat en hom bekla oor reels wat vir all werknemers geld, maar hom nie aanstaan nie. Net soos ontslag is 'n gedwonge bedanking 'n alle laaste opsie. Dit is 'n uitweg wat 'n werknemer nie mag volg terwyl daar no gander uitweë is nie."

This dictum represents a salutary caution that constructive dismissal is not for the asking. With an employment relationship, considerable levels of irritation, frustration and tension inevitably occur over a long period. None of these problems suffice to justify constructive dismissal. An employee, such as

appellant, must provide evidence to justify that the relationship has indeed become so intolerable that no reasonable option, save for termination is available to her.

Mr Klem who appeared on behalf of appellant, based his case on a series of a central propositions. He contended that the sudden "compulsion" to ensure that all employees of the company should sign a restraint of trade agreement was designed essentially to rid the company of Mr Jordaan.

Secondly, when Mr Gouws addressed the employees and placed the restraint of trade before them, it was done in circumstances where they were to be given 30 days to sign the agreement. Mr Gouws never disclosed to any of his employees that his motivation was in effect to rid the company of Mr Jordaan.

Thirdly, Mr Klem submitted that Mr Gouws, by virtue of the fact that he produced the restraint of trade unannounced and informed the employees that they had 30 days to consider and then sign the agreement on pain or on threat of a loss of employment, had used oppressive measures which rendered the position of each employee precarious.

Fourthly, because Mr Gouws had exercised this level of compulsion, and because the threat he uttered concerned a loss of security of employment by all employees, his conduct rendered the relationship with the employer intolerable. Hence Gouws's conduct could legitimately and justifiably be classified as a form of constructive dismissal as I have set out that concept out in this judgment.

I stated earlier that the onus, at the first stage of the inquiry was borne by the appellant. When the critical evidence of appellant and Mr Gouws, is examined, it reveals a different story from that urged upon us by Mr Klem.

That story can be summarised thus:

The relationship between Mr Jordaan and the company, via Mr Gouws as a majority shareholder had unquestionably deteriorated. By 14 July the agenda of the meeting prefigured the course of conduct on which Mr Gouws was intent insofar as Mr Jordaan was concerned. By 22 July, Mr Jordaan had been stripped of his managerial position and it was clear that he was now living on "borrowed time". Mr Gouws was concerned, as a result of these developments, with the possibility of Mr Jordaan setting up business in competition to the company.

None of his employees had entered into a restraint of trade agreement with the Company. He explained that he was anxious that these particular employees could leave his employ. A few passages from Mr Gouws' evidence suffice:

> "The situation in the office is obviously tense. Jacques Jordaan was cajoling and having private meetings with all and sundry in an effort to get them to go with him".
>
> "Further, I was led to believe that he (Jacques Jordaan) was opening up in competition, and I was tempting to protect my business as best I could, which is why I took the steps I did. I said what I said is that it is a very awkward having a wife as a competing estate agent in your office. Notwithstanding that fact, that Rina is an honest person, I would have kept her had she wanted to stay".

The evidence shows that Mr Gouws consulted with his attorney to determine how best to protect the business assets of the Company.

As he said:

> "The assets of an estate agent are intellectual properties, and database of clients, and the relationship one builds up with them. It is common practice that the estate agency spends an awful lot of money branding itself in order to get people to come to them. But once an agent has a client, the client follows the agent, notwithstanding the fact that in most events the agency was the one responsible for that action to happen".

This evidence, together with much of the balance of his evidence, indicates a legitimate apprehension that, were Gouws to have done nothing, he would have lost key staff. The organisational rationale for ensuring that employees, not I might add, only employees affected by the Jordaan connection, was to ensure loyalty to the Company and to obviate the possibility that it could have been denuded dramatically of intellectual assets, namely employees who, by the making of the business held the value of the Company.

In my view, notwithstanding differences between the testimony of the witnesses, the clear narrative that emerges from the record, supports the version of the company. It is a plausible and justifiable cause of action,to obtain a restraint of trade, when faced with the position confronted by Mr Gouws. There is no justification, other than in some imaginative conspiracy

theory, to conclude that the real issue concerned the subversion of the Role of Mr Jordaan. True, Mr Jordaan's deteriorating relationship with Mr Gouws triggered off the latter's action, but, as stated, that was designed to protect the assets of the company, no more and no less.

There is, further evidence which renders appellant's case even more problematic. Mr Gouws testified that appellant was ultimately determined to leave. It is correct, as Mr Klem submitted, that Mr Gouws never took the appellant into his confidence by suggesting that if she had not signed the restraint he would have done nothing. But objectively speaking, her own evidence is instructive in this regard:

> "So he would go and discuss it where after he would make a decision. There was no ultimatum, was there? Well I had to sign the restraint of trade otherwise I would have had to leave the company, that was his words, we would be asked to leave the company. No, but you now putting a different version, you say you asked him to fire you and he said he would go and talk to his lawyer, you said will you fire me, he said, I will talk to his lawyer. That never happened. So you never knew what was going to happen did you? No".

Furthermore, when appellant was exposed to cross examination, she conceded that, while she might have had subjective apprehensions as to the consequences of a refusal to sign, there was no objective justification for the conclusion that she would have lost her job in circumstances if she had refused to so sign the restraint. That itself, accords with Mr Gouws' own evidence that

he was trying to play "a game of bluff" to ensure that she signed, but that she was far too valuable a member of his staff to be let go were she not to have signed the restraint.

In summary, the evidence in this case falls significantly short of that, where it could be concluded "the employer behaved in a deliberately oppressive manner and left the employee with no option but to resign or to protect his or her own interests" See *Grogan, Workplace Law (4th edition at 105)".*

Furthermore, given Conradie JA's approach in *Old Mutual Group Schemes,* with regard to the onerous burden placed upon an employee, there is not, on a proper analysis of the evidence, a justifiable conclusion that appellant's employment became intolerable. There was no evidential basis by which to justify, on the probabilities that there was a clear, objective and immediate threat of dismissal. To be sure, there may well have been some tension but that was to be explained by the Jordaan departure and by the decision that employees should sign a restraint of trade agreement. On its own, that can never justify constructive dismissal. Were to do so, these courts would be flooded with constructive dismissals from employees who had had some form of controversial engagement with their employer but which does not amount to constructive dismissal.

For those reasons, I would dismiss the appeal. Mr Klem submitted that the appellant came to the Labour Court in good faith and that therefore should not be muleted with costs. But, Mr Wade who appeared on behalf of the sixth respondent correctly noted, that argument is hardly a basis by which not to award an order of costs, particularly in a case in which it was sought to stretch

the law relating to constructive dismissal in a manner which, in my view, has not yet been nor should it be contemplated by the courts.

For these reasons, I would dismiss the appellant's appeal with costs.

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DAVIS JA

WAGLAY DJP:)

MUSI AJA:) Concur

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APPEARANCES:

For the appellant: Adv. H.G. Klem SC

Instructed by: W.H. Opperham Attorneys

For the Respondent: Mr R.B. Wade

Instructed by: Russel Inc.

Date of Hearing: 11 May 2010

Date of Judgement:11 May 2010

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APPEARANCES:

For the appellant: Adv. H.G. Klem SC

Instructed by: W.H. Opperham Attorneys

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For the Respondent: R.B. Wade

Instructed by: Russel Inc.

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