IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN BRAAMFONTEIN

CASE NO: J 700/08

In the matter between:

SIHLALI, MAFIKA **Applicant**

and

SOUTH AFRICAN BROADCASTING CORPORATION LTD **Respondent**

JUDGMENT

VAN NIEKERK J

Introduction

[1] The applicant was employed by the respondent (the SABC) as its legal adviser in terms of a fixed term contract concluded on 1 August 2006. The contract was to terminate automatically three years later, on 31 July 2009. On 25 August 2007, 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 s 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 resignation; alternatively, because the applicant repudiated his contract of employment by sending the sms and failing afterward to tender his services.

[2] The parties' legal representatives 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. I directed that evidence be led initially only in respect of those issues.

[3] The applicant led evidence on his own behalf, and called a further witness, a Mr Thabang Mothibe. After the applicant had closed his case, Mr Pretorius SC, who appeared for the SABC, applied for absolution from the instance. This is my ruling on that application.

The applicable principles: absolution from the instance

[4] This Court recently affirmed its power to grant absolution from the instance in appropriate circumstances. The test is whether at the close of a plaintiff's case, there is evidence upon which a court, applying its mind reasonably to that evidence, could or might find for the plaintiff (see: *Minister of Safety and Security v Madisha & others* (2009) 30 *ILJ* 591 (LC), referring to *Claude Neon Lights (Pty) Ltd v Daniel* 1976 (4) SA 403 (A)). In *Claude Neon*, the court formulated the test as follows:

> *"When absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff (Gascoyne v Paul and Hunter 1917 TPD 170 at 173, Ruto Flour Mills (Pty) Ltd v Adelson (2) 1958 (4) SA 307 (T)"*

Harms JA approved this approach recently in *Gordon Lloyd Page & Associates v Rivera & another* 2001 (1) SA 88 (SCA) at 92 G, where he added:

> *"This implies that a plaintiff has to make out a prima facie case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff…"*

The evidence

[5] It is common cause that the applicant's contract of employment no longer subsists. The applicant's contract contemplated that he would be employed for a period of 36 months, from 1 August 2006 until 31 July 2009, when the contract would 'terminate automatically'. Despite the contemplated duration of the contract, the SABC's personnel regulations (which form an integral part of his contract of employment) contemplate a prior termination at the initiative of either party. The relevant clause in the regulations reads as follows:

> *"TERMINATION OF SERVICE*
>
> *(a) An employee's services may be terminated at any stage for misconduct, incapacity, poor performance or for operational requirements of the Corporation or for any reason justified in law.*
>
> *(b) With the exception of staff appointed on extraordinary terms and conditions of employment, and subject to the provisions of Part VI of these legislations, the services of any employee may be terminated in writing as follows:*

(i) One (1) week's notice if the employee has been employed for four (4) weeks or less;

(ii) Two (2) weeks' notice if the employee has been employed for more than four (4) weeks but not more than one year;

(iii) Four (4) weeks' notice if the employee has been employed for 1 (one) years or more.

(c) …

(d) *The Group Chief Executive may, in his discretion, agree to a shorter period of notice given by an employee. Where an employee gives a shorter period of notice and the Group Chief Executive accepts the shorter period of notice, the employee shall not be entitled to receive notice pay in lieu of that period of notice which the Group Chief Executive has agreed to waive."*

[6] The material facts preceding the sending of the sms to Mpofu on 25 August 2007 are briefly the following. In late 2006, the applicant, who was head of the SABC's legal department, commenced an investigation into breaches of the Public Financial Management Act by senior SABC officials. The investigation culminated in a memorandum submitted to Mpofu recommending that disciplinary steps be taken against two senior executives, including the chief financial officer. In April 2007, the applicant was advised that a resolution had been adopted to investigate the law firm of which the applicant was a director prior to his appointment at the SABC, following allegations that emanated from the SABC's internal audit department. The applicant denied any impropriety, but agreed with Mpofu that he would take two weeks' leave during which the audit committee would conduct an investigation. The applicant returned to work on 15 May 2007, and after further discussion agreed with Mpofu that he would take further 'special leave' until 5 June 2007. When the applicant returned to

work in July 2007, the Mail and Guardian newspaper requested the applicant to respond to allegations apparently contained in an internal audit report, which the applicant had not seen. On 20 July 2007, the applicant obtained an interim interdict against the Mail and Guardian, preventing the publication of any allegations contained in the report. On 21 July 2007, the applicant sent a sms to Mpofu, stating that he intended to resign. He met with Mpofu on 22 July, and after a discussion with Mpofu, the applicant agreed not to resign. The Mail and Guardian later succeeded in having the interim order discharged, and published an article on 3 August reporting the allegations made against the applicant. On 13 July 2007, the applicant received a letter from Mpofu calling on him to furnish reasons why he should not be suspended pending a disciplinary enquiry. The applicant again brought an urgent application in the High Court, this time seeking to interdict a meeting convened to decide whether he should be suspended. The application was dismissed. On Saturday 25 August 2007, the SABC issued a press statement to the effect that the applicant had been suspended on full pay pending a disciplinary enquiry.

[7] The applicant testified in these proceedings that at approximately 11h30 on Sunday 25 August, he sent Mpofu the sms stating that he 'quit with immediate effect'. He did so after the accumulation of the events referred to above, the catalyst being a radio news bulletin broadcast earlier that morning in which his suspension was announced. The applicant stated that at this point, he felt that he was being sacrificed – he considered that he had been unfairly accused of misconduct, and was not getting the support to which he was entitled. Feeling betrayed, angry and in a 'blood rush', he decided to resign, and sent the sms.

[8] The applicant testified further that in the period between 25 August 2007 and 11 October 2007, he had a vague recollection of events. He spent time at home, seldom venturing out, in what he described as a 'dark

period' of his life. During this period, he realised that he was not thinking straight when he sent the sms to Mpofu and that, looking at the longer term implications, he was concerned that it could have been construed as an attempt to avoid the disciplinary charges against him. The only way for him to clear his name and reputation was for the enquiry to proceed, so that the matter could be cleared up one way or another. For these reasons, on 11 October 2007, the applicant sent Mpofu an email. The email read:

> *"Dali my contract still subsists. You should proceed with your disciplinary charges within the next 14 days. Otherwise I will take it as repudiated."*

[9] On 12 October 2007, Mpofu's executive assistant sent the applicant the following email:

> *"Mafika*
>
> *Thank you for your note – Dali is currently in Korea and his cell phone is not working, but I will try to get it to him.*
>
> *In the meantime, please receive the attached letter that I have been trying to send you for the last two weeks without success as we never find anybody at the address on your personnel file (8 Rudderford Street, Sunninghill)"*

[10] The attached letter, dated 28 September 2007, reads as follows:

> *"Dear Mr Sihlali,*
>
> *TERMINATION OF EMPLOYMENT RELATIONSHIP*

I wish to confirm that on 25 August 2007, you sent me an sms indicating your decision to resign your employment with the SABC. On the same day you made statements to the media announcing the same decision.

While accepting your decision I subsequently sent you a massage to submit a letter of resignation, which you have ignored.

I wish to reconfirm that from the SABC point of view your resignation was accepted and that you are now obliged, before 31 October 2007, to return any property of the SABC within your possession and control and to finalise any outstanding matters with the Human resources Division.

It remains for me to thank you for your service and wish you luck in your future endeavours.

Yours faithfully

Dali Mpofu
Group CEO"

It is common cause that the first occasion on which the applicant had sight of this letter was 12 October 2007, the day the applicant received the email from Mpofu's assistant.

Resignation

[11] 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; *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.

[12] 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*)).

[13] 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 (s*upra*) 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.'[1]

[14] 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.[2]

Analysis

[15] 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

[1]. See also *Southern v Franks Charlsely and Co* [1981] IRLR 278.
[2] MR Freedland *The Personal Employment Contract* (OUP. Oxford, 2003) at p. 420. See also *CEPPWAWU & another v Glass and Aluminium 2000 cc* [2002] 5 BLLR 399 (LAC),

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.

[16] In my 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.

[17] Mr Hardie, who appeared for the applicant, contended that the sms sent by the applicant to Mpofu 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.

[18] In support of the first leg 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'. I am 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 to me that this is a requirement that may be waived. But I need make no finding in this regard - a communication by sms is a communication in writing. Section 12 of the Electronic Communications and Transactions Act, 25 of 2002 provides:

"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] 10 BLLR 954 (LC)). The applicant's resignation by sms was therefore a resignation submitted in writing.

[19] In support of the second leg of his argument, Mr Hardie contended that I was bound by the judgment of the Labour Appeal Court in *CEPPWAWU & another v Glass and Aluminium 2000 cc* [2002] 5 BLLR 399 (LAC), and the principle established in that judgment to the effect that a resignation tendered by an employee requires acceptance by the employer party. In his judgment, Nicholson JA dealt with a claim of constructive dismissal, i.e. a claim by an employee that he resigned because the employer had made continued employment intolerable. The employee concerned, a shop steward, had left his employment 'in the heat of the moment'. In the course of his judgment, and in the context of a discussion on resignation generally and how ambiguous statements and conduct should be interpreted, Nicholson JA stated that "Resignation brings the contract to an end if it is accepted by the employer" (at paragraph [33] of the judgment). There is no authority cited for this statement, which has been criticised as an incorrect reflection of the law. (See, for example, Grogan *Dismissal, Discrimination and Unfair Labour Practices*, at p145; PAK le Roux *Current Labour Law* 2002, at p 4). Mr Hardie found support for his submission in *Uthingo Management (Pty) ltd v Shear NO & others* (2009) 30 *ILJ* 2152 (LC), where this court, referring to *Glass and Aluminium*,

appears to have accepted that the intention of an employer in accepting notice given by an employee must be 'clear and unconditional' (at 2155J).

[20] The statements made in *Glass and Aluminium* and *Uthingo* to the effect that it is necessary for a resignation to be accepted by an employer are *obiter*. *Glass and Aluminium* concerned a statutory claim of unfair dismissal and the interpretation of s 186 (1) of the LRA rather than a contractual claim such as the present; *Uthingo* was a review of an arbitration award in an unfair dismissal dispute, an element of which concerned the application of a notice clause in an employment contract and the definition of 'dismissal' in s 186. I see no reason to depart from the long line of authorities referred to in paragraph [11] above, all of which directly concern themselves, as does this case, with contractual disputes. The effect of the authorities is that a resignation is a unilateral act by an employee that does not require acceptance by the employer.

[21] 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.

I accordingly make the following order:

1. Absolution from the instance is granted, with costs.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

Date of hearing: 23 November 2009
Date of Judgment: 14 January 2010

Appearances:

For the Applicant: Mr. Hardie from Stephen Hardie Attorneys

For the Respondent: Adv P Pretorius SC; with Adv M Dewrance
Instructed by: Eversheds