

IN THE INDUSTRIAL COURT OF SOUTH AFRICA

HELD AT DURBAN

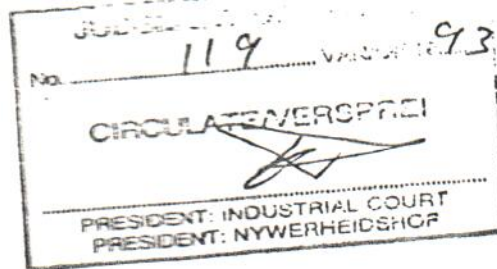
R (?)  
NHN 13/2/2832

IN THE MATTER BETWEEN:

G MISRA

AND

SANJAY BADRILAL MISRA  
trading as MADAME ET MONSIEUR



APPLICANT

RESPONDENT

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CONSTITUTION OF THE COURT:

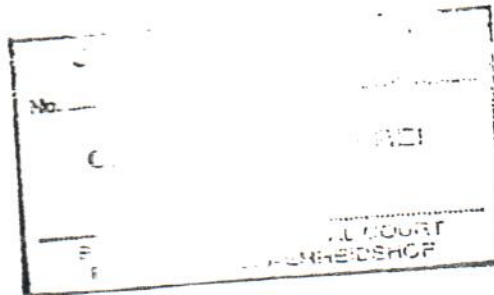
ADV S J VAN ZYL

SENIOR MEMBER

ON BEHALF OF:

APPLICANT:

ADV L PILLAY  
Instructed by:  
MR V CHETTY  
V CHETTY AND COMPANY  
DURBAN



RESPONDENT:

ADV WINCHESTER  
Instructed by:  
MR L PADAYACHEE  
LOGAN PADAYACHEE AND COMPANY  
DURBAN

DATE AND PLACE OF PROCEEDINGS:

14 SEPTEMBER 1993 - DURBAN

# J U D G M E N T

The applicant and the respondent in this matter are husband and wife. They were married to each other in community of property on the 7th January 1980. The applicant has instituted divorce proceedings in the Durban and Coast Local Division of the Supreme Court of South Africa against the respondent. It appears not to be an amicable divorce as is apparent from this application.

The respondent is the sole proprietor of a business which operates in terms of a franchise agreement concluded with a close corporation known as Madame Et Monsieur CC. The applicant commenced her employment with the respondent during October 1992. She was dismissed on the 23rd July 1993. In her founding affidavit, the applicant says that when she was dismissed the respondent did not give her any explanation for her dismissal. An enquiry by her elicited the response that the business was his and he could do what he liked. He then handed her a cheque for R2,250-00 which appeared to be her salary and some holiday pay that he had calculated whereafter he told her that she was not to be seen at the business again. Another person was subsequently employed to replace her. She says that in the absence of any explanation given by the respondent, she infers that her dismissal was prompted by the fact that she had instituted divorce action against the respondent and calculated to bring financial pressure to bear on her in that action.

The respondent on the other hand says that as he has other business interests, he is unable to personally supervise and manage the business. The applicant was therefore accepted by

the franchisor as the person entitled to supervise, manage and control the business. During periods that the applicant was not present at the business, the franchise agreement required the presence of the therapist. The applicant would, in the normal course of events, give him prior warning if she was to be absent and the respondent would then ensure the presence of the therapist during her absence.

According to the respondent, on the 23rd July 1993 he phoned the business at approximately 11h00 as he wanted to speak to the applicant. I may add here that according to the respondent there are only three employees of the business. They were at the time the applicant, the therapist and a third employee. He was informed by that third employee that neither the applicant nor the therapist were present at the business. He again telephoned at approximately 13h00. The same employee informed him that the applicant had still not returned, that the therapist was not present either and that there were a number of clients at the time undergoing treatment. The third telephone call the respondent made was approximately 13h30. This time the applicant answered. His enquiries as to her whereabouts she met with the response that she had had to go out. She declined to give him any reasons for her absence. He made a fourth telephone call at 14h15. A person whom he calls a third party and does not identify answered the telephone and told him that neither the applicant nor the therapist were present. The respondent says that on the 24th July 1993 he had a discussion with the applicant. During this discussion he asked the applicant why she had been absent from the business the previous day and why she had not given him prior warning of her absence.



He said to her that if she was going to be absent from the business, she knew that he had to have prior warning thereof so that he could ensure the presence of a therapist. Respondent says that the applicant declined to give him any reasons for her absence and told him that if she wished to be absent from the business she was free to do so and she had no intention of informing him of any impending absence on her part and she did not see any reason why she should do so. He says that she also told him that she had in fact closed the business between 14h30 and 16h00 on the previous day. He told the applicant that he found her attitude unacceptable but, as he puts it, she maintained the attitude which he referred to earlier. He then calculated the amount due to the applicant in respect of her salary and holiday pay, told her that he felt that he was compelled to dismiss her, handed her the cheque and told her that she was dismissed and should not again attend at the business.

The other complaints that the respondent makes against the applicant are firstly, a decline in turnover which he attributes to the applicant's performance; secondly, allegations that she frequently entertained a male visitor in one of the cubicles; thirdly, that she discussed their matrimonial problems with clients; fourthly, that the tension caused by the marital problems impinged on their business discussions and they are not able to work together and, lastly, the respondent contended that the applicant's remedy lies not in this application but in one in terms of Rule 43 of the Uniform Rules of the Supreme Court.

As far as these allegations are concerned, the applicant denies them. She has something to say about the fact that

communication need not take place directly but could be through correspondence between the attorneys. That, of course, is nonsense. It is inconceivable that a business could be run by correspondence through two sets of attorneys.

As far as the discussion of her marital problems are concerned, she says that the relationship between her and the clients are of a confidential nature and these matters are often discussed but do not prejudice the business in any way.

It is necessary to deal briefly with the other complaints raised by the respondent. As far as the decline in turnover is concerned, the respondent has listed the turnover of the business for a period commencing October 1992 and ending July 1993 which shows somewhat of a fluctuation but an eventual decline. However, the respondent has not placed any facts before me on which I can assess the validity of his allegation that the decline in turnover has been caused by the applicant's performance. There are other factors which may cause or contribute to a decline in business and no facts have been placed before me to show why these other factors could not have been the cause of that decline. What is more, he admits that prior to her dismissal he at no stage raised with her any complaints about her performance. That allegation is therefore not substantiated. As far as her alleged improper behaviour in the cubicles is concerned, what has been placed before me is pure hearsay. There is no confirmatory affidavit by the person who conveyed these facts to him nor has he advanced any reason as to why such an affidavit could not be filed. Although conduct of that nature may very well be a factor to consider in



a dismissal situation, in the absence of any confirmation of those allegations or any explanation for the lack thereof, I propose to disregard those allegations. The marital problems that are discussed with the clients may also not be conduct which is quite proper but once again no foundation has been laid on which to base a finding that those discussions are harmful to the business. As far as the working relationship between the two parties is concerned, I will deal with that in due course.

As to the final submission made that the applicant's remedy lies in a Rule 43 application, she of course has that remedy, but although that avenue is open to the applicant if she is in need of maintenance pendente lite, it is in my view not a consideration in the application before me.

The only complaint that has been raised by the respondent, which in my view has substance, is the applicant's absence without notice to him and her subsequent attitude when she was spoken to. The applicant, of course, says that the complaint is not justified. Her explanation for this is contained in her replying affidavit in which he says on the day in question, which is the 23rd July 1993, she was absent from the premises on two occasions. She said that just after 13h00 she took certain boxes upstairs to a hairdressing salon in the same building. This she did as a favour to the proprietor of the hairdressing salon and she could not have been gone for more than five minutes. The second occasion she says was about 15h00 that she left the shop. What took place there is not quite clear because her affidavit says that she returned at 15h00. She said further

that she ensured that no bookings by clients had been made during that period and her absence did not cause any prejudice to the business. Regarding the allegations made by the respondent about her attitude in their discussion the following day, she merely denies that she told the respondent that she regarded herself as being free to leave the business whenever she wished to do so. She does not say whether she said anything else to him or if so, what. In the absence of any information from her side in this regard, it seems to me that the probabilities are that she is not entirely truthful in her denial. Accepting for purposes hereof that she in fact did what the respondent says she did and that her attitude was in the nature of the respondent's allegations, such an attitude by an employee is of course not one which would normally be countenanced, nor would an employer be required to tolerate it.

However, this case has its own peculiar background and in my view, allowance must be made for the relationship between the parties, which, by its very nature, must have been intimate and familiar. It is not possible on the affidavits to conclude whether her attitude was merely token defiance, given the somewhat acrimonious relationship between them at the time or whether she was voicing a firm intention to go her own way. The future would have told. In those circumstances, dismissal was in my view not justified and it was not the route for the respondent to take. I am of a view that the respondent could have addressed the situation adequately with a warning to her. If then, what she had voiced was a firm intention, disciplinary action could have been taken against her when and if she disobeyed his instructions.



As far as the appropriate relief is concerned, it is relevant to mention here the problems with communication between the parties which was raised by Mr Winchester and the fears voiced by Mr Winchester of a real danger of a further decline in the business. Now, from the papers it appears that the applicant and the respondent still reside in the same house. Although it is not clear from the papers, it is highly probable that they may not sleep in the same bedroom, but they still live together. As far as the working relationship between them is concerned, they will just have to behave like adults and for the sake of the good of the business, set aside their differences that arise from the divorce action. If the respondent is able to establish that a decline in the business can be attributed to the applicant's performance or lack thereof or if the applicant carries out her stated intention of absenting herself at will against the respondent's instructions, the respondent will of course be fully entitled to take such disciplinary or other action as may be called for in the circumstances.

Ultimately, I am of the view that the applicant has made out a case, prima facie at least, that her dismissal was unfair and I have concluded that reinstatement is the appropriate remedy. Bearing in mind, however, my conclusion on what the applicant said to the respondent when he talked to her about her absence, I have decided not to make the order fully retrospective because in those circumstances, the applicant was to a large extent the author of her own misfortune and she must bear some of the blame for the fact that the parties are before the Court. For that reason too, I propose to decline Mr Pillay's invitation to me to make a costs order against the respondent. In the result



I make the following order:

1. The respondent is ordered to reinstate the applicant in her employ on the same terms and conditions that prevailed immediately prior to her dismissal on 23 July 1993.
2. This order in paragraph 1 hereof shall operate from 01 September 1993.
3. The matter is adjourned to 08h30 on 26 November 1993 for the hearing of any application for the further extension of the order.

JUDGMENT DELIVERED AT DURBAN ON 16 SEPTEMBER 1993.

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