IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case No.: JR 327/01

In the matter between

LOU'S WHOLESALERS (PTY) LTD	Applicant
And	
THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	1st Respondent
PAUL, W NO	2nd Respondent
VAN BILJON, COLLEEN	3rd Respondent

JUDGMENT

REVELAS, J.:

[1] This is an application for review of an award made by the second respondent ("the arbitrator") in favour of the third respondent, a former employee of the applicant. The third respondent left the services of the respondent on 2 December 1999. The precise circumstances of her departure are in dispute.

[2] The third respondent had referred a dispute about an "unfair dismissal" and a "failure to pay notice pay" to the first respondent ("the CCMA"). Conciliation failed and the arbitrator who eventually arbitrated

the matter, held that the third respondent was indeed dismissed and that the dismissal was unfair. In terms of the award the applicant had to pay the third respondent compensation in an amount equal to twelve months' wages. It is common cause that on 21 April 1999 the applicant had employed the third respondent for a fixed period of three months from 1 May to 31 July 1999.

[3] As from 31 August 1999, the third respondent was employed in a permanent capacity as a sales representative. The third respondent refused to sign the new letter of appointment due to, what she perceived to be certain offensive clauses in the letter of appointment.

[4] The third respondent claimed that she had been dismissed unfairly on 24 December 1999. The applicant's version is that when the applicant's M.D. insisted that she sign the letter, the third respondent decided to leave the applicant's services and did so voluntarily. The two clauses which gave rise to the third respondent's unhappiness and unwillingness to sign the letter of appointment, were firstly a restraint of trade clause and secondly an obligation to pay the insurance excess on any accident which occurred involving the company vehicle she was driving.

[5] When the third respondent took up her position as sales representative with effect from 1 August 1999, she made an election to take a company car instead of a car allowance. She drove the car for the period August to December 1999.

[6] The restraint of trade clause was a standard agreement signed by all sales employees.

[7] The applicant contended that by her conduct in taking up employment on 1 August, she worked according to the terms and conditions of her letter of appointment even though she refused to sign the letter.

[8] The third respondent testified before the arbitrator that on 24 December 1999, whilst she was no sick leave, she was called by the Managing Director of the applicant. She was due to take up leave on 25 December 1999 to 10 January 2000. He wished to see her about her letter of appointment. She requested him to deter the matter until her return, but he insisted that the matter had to be dealt with immediately. According to the third respondent, she was told by the Managing Director that if she did not sign the agreement, she must leave as she was dismissed. She then asked him again to reconsider the liability clause. She was then told to leave her car keys and cell phone on the desk and leave.

[9] Mr Dorfling, the applicant's Managing Director, gave evidence that the third respondent was offered a permanent position after the three month probation period because she excelled in her duties. Numerous requests were made to her to sign her letter of appointment containing the standard clauses. When he wanted her to sign the letter of appointment she walked out, leaving her cell phone and telephone on his desk.

[10] The arbitrator reasoned as follows:

"**The respondent refutes the allegation that the applicant was dismissed, yet confirms that the applicant had a concern regarding the R20000-00 liability**

clause in the contract. It is also conceded that the applicant did not tender a letter of resignation.
The applicant on the other hand claims that she was dismissed on the spot for not signing the contract.
And she gave evidence that she was on sick leave and about to go on paid annual leave, and would not resign, lose her paid leave, and above all, be without a lift back home.
She also argued that she would also not give up her lively hood on the day before Christmas.
It is clear that the issue of the R20000-00 liability became a serious issue.
In the absence of document proof I must make my award on the balance of probability. (sic)

It is therefore my opinion that the respondent dismissed the applicant after he had summoned her by telephone to sign the contract, while she was still on sick leave."

[11] The third respondent made it very clear that she was not at all willing to accept the applicant's policy in terms of the potential excess payments. She was not going to continue her employment with the applicant on those terms. Even though the probabilities in my view favour the applicant, the arbitrator burdened the applicant with the onus to prove that the third respondent had resigned. That is contrary to the provisions of section 192(1) of the Labour Relations Act 66 of 1995 as amended ("the Act") in terms of which the employee bears the onus of proving a dismissal.

[12] Having found that there was a dismissal, the arbitrator simply jumped to the conclusion that the dismissal was both procedurally and substantively unfair. No reasons are advanced in this regard.

[13] On the facts the arbitrator should have found the third respondent was not dismissed. An offer of employment was made to the third respondent and the parties did not agree on the terms thereof. The terms proposed were reasonable and standard terms for all employees. Therefore no contract came into being. An employer cannot be expected to form employment relationships on the terms dictated by prospective employees, failing which the employer faces an unfair dismissal finding against it. That would be unfair and contrary to the basic principles of contract and the very nature of an employment relationship.

[14] For the aforesaid reasons the award fell to be set aside and replaced with a finding that the third respondent was not dismissed.

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REVELAS J

For the applicant:
For the respondent:

Date of hearing:
Date of judgment: