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IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

CASE NO: JR476/2001

2001-10-26

In the matter between

RUDOLPH M DIECKMANN

Applicant

and

CCMA

Respondent

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J U D G M E N T

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LANDMAN, J: Mr Rudolph Dieckmann says he was dismissed by his employer S A Freight Goodwin Project (Pty) Limited. His employer denies this and says that he resigned. His employer points to its letter of 31 May 1999 which reads as follows:

"Dear Rudi.

We confirm that your services with our company are no longer required with effect from 31 May 1999.

In terms of your letter of appointment you are due to provide a calendar month's notice to the company. In this respect as agreed with yourself, the writer and George Du Plessis you will be free to look for alternative employment during your notice period but are to hold yourself available should we require your services during this period. As also agreed you will hand over to George Du Plessis all documentation relating to the work that you have been engaged in and all supply information etc.

We thank you for your input during your period with our company and wish you every success in the future."

The matter proceeded to arbitration before a Commissioner of the CCMA. The Commissioner heard Mr Dieckmann's evidence and that of four witnesses called by the employer. The Commissioner concluded that Mr Dieckmann had resigned and dismissed his application for relief. Mr Dieckmann launched an application to review and set aside the award. This application was so defective that my brother CASSIM, AJ directed that it be withdrawn and replaced by a fresh application. The fresh application is out of time but for present

purposes the late filing of the application is condoned.

It is convenient so summarise Mr Dieckmann's evidence starting with the events which took place on 22 May 1999. Mr Dieckmann says that on Friday 22 May 1999 he experienced a shortage of personal funds due to unforeseen car repairs. He approached a certain Mr Theron, who works for the company, and asked him how long he would have to wait for the reimbursement of his travelling expenses. His expenses amounted to R1 500,00. There was some difficulty in securing payment of those expenses. Mr Theron told Mr Dieckmann to stop harassing him. Mr Theron said, "Ag Rudi stop harassing me, fuck off."

On 24 May Mr Dieckmann went to the Department of Labour and was referred to the labour officer in Kempton Park. He explained his difficulty to them. Thereafter he returned to the company and spoke to Mr Goodwin and Mr Du Plessis. He says that Mr Du Plessis told him to clear out and he began removing his belongings. Three days later on 31 May Ms Carron, Mr Goodwin's secretary, handed him the letter dated 31 May. Mr Dieckman viewed this letter as a letter of dismissal.

The employer led four witnesses. The fourth witness was Ms Carron. When all the evidence had been led Mr Dieckmann addressed

the Commissioner and, in the course of his address, said at page 56 of the typed record: "Okay I say apart from Ms Carron the witnesses brought forward by the company are lying." The result is that Mr Dieckmann apparently accepts that Ms Carron's testimony is truthful and therefore it is important to see what she said. Ms Carron said that she saw Mr Du Plessis on the afternoon of 24 May in the reception area.

She also saw Mr Dieckmann. Mr Dieckmann approached Mr Du Plessis and asked him whether he was fired to which Mr Du Plessis replied "No". She went on to say "then Mr Dieckmann (inaudible) and Mr Du Plessis said no you are not fired but that you have resigned earlier." She also knew that sometime in the month of May Mr Dieckmann had said that he was unhappy and was looking for other jobs and was going for interviews.

She also told the Commissioner what happened earlier on 24 May. Mr Dieckmann came into the board room where Mr Goodwin and Mr Du Plessis and Ms Carron were present. He was highly agitated and he said something to the effect that he had enough and that he was leaving and that he was taking legal action. She says she does not remember him using the word "resign" but that he said that he was fed up and had enough and was leaving.

I have already mentioned that Mr Dieckmann regarded Miss

Carron as a truthful witness. However during the course of his address he also had the following to say. "I am leaving. This was not the truth Ms Carron probably misunderstood what was said".

Mr Du Plessis who was at that meeting also commented on what transpired between Mr Dieckmann and the other persons in the room. He also confirms that Mr Dieckmann did not use the word "resign" but he did say "I am leaving I am out of here. I am packing my stuff I am going." The clear implication of all this is that Mr Dieckmann was not dismissed. He tendered his resignation on 24 May and this is how the Commissioner saw it. There is nothing which indicates that her finding in this respect was defective or irregular in any manner.

However, later on 26 May Mr Dieckmann returned to the company. He returned because the Department of Labour phoned the company on his behalf. According to him the official was told that the company had not dismissed Mr Dieckmann.

On his return the matter of his continued employment was taken up by Mr Goodwin and Mr Du Plessis. Their evidence is that Mr Dieckmann said to them that he had a job offer or that he was on a short list for jobs with other companies and indeed this was true. The letter of 31 May is consistent with the version of Mr Goodwin and Mr Du Plessis. They accepted his resignation and said that he need not work

out his period of notice but that he should be on hand if they required him and he was required to hand over information belonging to the company. The Commissioner accepted this, and concluded that the letter of 31 May constituted an acceptance of Mr Dieckmann's resignation. I can find no reason why this court should interfere with that finding.

Mr Dieckmann, in his application to review and set aside the award, set out a series of complaints about the conducts and findings of the Commissioner. Some of these allegations are extremely serious but they are not justified by a reading of the transcript. For instance it is alleged that the Commissioner failed to inform him of his rights regarding legal representation. Why this should be necessary when, on Mr Dieckmann's own version his attorney, was sitting outside the arbitration chamber is not explained. This does not constitute misconduct. Had his attorney wish to address the Commissioner the attorney should have done that. If the application has turned down then the attorney could have sat outside. Mr Dieckmann could have informed the Commissioner that his attorney was outside. This was not done. There can be no suggestion of any irregularity on the part of the Commissioner.

I should mention another example. Mr Dieckmann complains

that the Commissioner should have investigated the possibility of a constructive dismissal. There was, however, no reason for her to do so. On page 18 of the typed record Mr Dieckmann says:

"MR DIECKMANN: I am not making a case of constructive dismissal. I was clearly dismissed. That was constructive it was a dismissal or a constructive dismissal. What I am saying here is that prior to my dismissal the company try to bring about a constructive dismissal.

MR ISRAELSTAM: Thank you for the clarification so we have it then on record there is no application for constructive dismissal?

COMMISSIONER: No.

MR ISRAELSTAM: We are talking about a straight forward dismissal?

MR DIECKMANN: Yes."

It is not permissible for Mr Dieckmann to complain at this stage that the Commissioner did not make a finding about constructive dismissal when he led her to believe that, that was not his case.

Mr Dieckmann also alleges that the Commissioner should have found that he had not resigned as he had not provided a written notice of resignation in accordance with the Basic Conditions of Employment Act of 1997. It is quite correct that he did not do so. The

Commissioner was aware of this but she concluded that he had said he was resigning and that he was obliged to tender the resignation in writing. He did not do so and the Commissioner says that, that did not effect the situation.

In my view the Commissioner's finding is a justifiable one. Once a senior employee makes it clear that he does not wish to work any longer and that he resigns then the rest is a mere formality and he cannot hide behind that. The Commissioner considered all the evidence which was placed before her including the facts set out in the unsworn address which was directed to her at the opening of the arbitration. If there was a deficiency in the arbitration proceedings in the sense that Mr Dieckmann was unaware that his statement should have been made under oath then this was cured by the way in which the Commissioner dealt with the evidence.

There is therefore no reason to interfere with the award and in the premises the application is dismissed.

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A A Landman

Judge of the Labour Court of South Africa

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